(22,482.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 487.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

D. L. REID AND ETTA C. REID, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1911.

1 The Supreme Court of North Carolina.

D. L. REID and Wife, ETTA C. REID, Plaintiffs,
v.
SOUTHERN RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

Southern Railway Company, the above named defendant, respectfully shows that on the 30th day of November, in the year 1910, the Supreme Court of North Carolina, which is the highest court in that State in which a decision in the action referred to herein could be had, rendered a judgment against your petitioner in a certain action in which D. L. Reid and Etta C. Reid were plaintiffs, and your petitioner, Southern Railway Company, was defendant.

In said action there was drawn in question by your petitioner, the validity, as applied to this case, of a statute of, or an authority exercised under, the State of North Carolina, to-wit, Section 2631 of the North Carolina Revisal of 1905, on the ground of its being repugnant to the Constitution, and to the laws, of the United States, and the decision of the Supreme Court of North Carolina was in favor of its validity; and in said action a right, privilege or immunity was specifically set up and claimed by your petitioner under the Constitution, and under a statute, of the United States, and the decision of the Supreme Court of North Carolina was against the right, privilege or immunity so set up and claimed; all of which will more fully and in detail appear from the assignment of errors filed herein.

Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of North Carolina in rendering judgment against it in this action, it respectfully prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correcting of the errors complained of; that an order may be entered fixing the
2 amount of a supersedeas bond herein; that a duly authenticated transcript of the record and proceedings herein in said Supreme Court of North Carolina may be sent to the Supreme Court of the United States; and that the decision and judgment of the Supreme Court of North Carolina herein may be reversed and annulled.

WILLIAM B. RODMAN,
Attorney for Southern Railway Company.

STATE OF NORTH CAROLINA,
Supreme Court, To wit:

Let the writ of error above prayed for issue, upon the execution of a bond by Southern Railway Company payable to D. L. Reid and

Etta C. Reid in the sum of Six Hundred dollars, such bond when approved to act as a supersedeas.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, being the highest Court of Law or Equity of the said state in which a decision could be had in the said suit between D. L. Reid and Etta C. Reid, his wife, and the Southern Railway Company, a corporation, wherein was drawn in question the validity of the statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right,
4 and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, 31st day of December, in the year of our Lord One Thousand Nine Hundred and Ten.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

U. S. GRANT,
Clerk Circuit Court of the United States, Eastern District of North Carolina.

Allowed.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

5 Supreme Court of the State of North Carolina.

D. L. REID and Wife, ETTA C. REID, Plaintiffs,
v.
SOUTHERN RAILWAY COMPANY, Defendant.

Assignment of Errors for the Supreme Court of the United States.

This was an action instituted by the plaintiffs, D. L. Reid and wife, Etta C. Reid, under Section 2631 of the North Carolina Revisal of 1905, to recover of the defendant, Southern Railway Company, a penalty denounced by said section for alleged failure to receive, give a bill of lading for, and forward certain household goods. The section referred to is as follows:

"2631. Penalty for Failure to Receive.—Agents or other officers of railroads and other transportation companies whose duty it is to receive freight shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment."

The shipment which it is alleged by plaintiffs the defendant company failed to receive, give a bill of lading for and forward consisted of household goods alleged to have been tendered by plaintiff, Etta C. Reid, for which plaintiffs allege said feme plaintiff requested defendant to issue its bill of lading, and which it is alleged defend-

6 ant was requested to transport from Charlotte, in the State of North Carolina, to Davis, in the State of West Virginia, being, therefore, an interstate shipment.

Southern Railway Company, defendant in the court below, and plaintiff in error in the Supreme Court of the United States, respectfully assigns as errors in the record and proceedings in this cause, in the Supreme Court of North Carolina, the following:

1. The Supreme Court of North Carolina erred in holding that Section 2631 of the North Carolina Revisal of 1905, above referred to, is, as applied to the interstate shipment in the proceedings mentioned, from Charlotte, in the State of North Carolina, to Davis, in the State of West Virginia, a valid exercise of state power; inasmuch as the state statute referred to is, as applied to the shipment in question, a regulation of interstate commerce which is solely within the power of Congress under Article I, section 8, clause 3, of the Constitution of the United States, the benefit and protection of which

Southern Railway Company duly and specially set up and claimed in these proceedings.

2. Said Court erred in holding that the state statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce forbidden to the States by being conferred exclusively on Congress by Article I, section 8, clause 3, of the Constitution of the United States, the benefit and protection of which said clause of the Constitution the Southern Railway Company duly and specially set up and claimed in these proceedings.

3. Said Court erred in holding that the state statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce beyond the power of the State to make, inasmuch as Congress in the Act to Regulate Interstate Commerce had already acted and had thus assumed ju-
7 risdiction over the entire subject matter of this action, the benefit and protection of which Act of Congress the defendant, Southern Railway Company, duly and specially set up and claimed in these proceedings.

4. Said Court erred in denying to the plaintiff in error, Southern Railway Company, the right, privilege or immunity of being governed, in respect to said shipment, solely by the Constitution of the United States and the Act to Regulate Commerce of Congress, and in adjudging said plaintiff in error, in respect to receiving, issuing a bill of lading for, and forwarding said shipment, to be subject to the state statute referred to herein, and in thus denying to Southern Railway Company the right, privileges or immunity aforesaid, which it duly and specially set up and claimed in these proceedings.

5. Said Court erred in holding that Section 2631 of the North Carolina Revisal of 1905 is not unconstitutional and void, as being in violation of Section 1, of Article 14, of the Amendments to the Constitution of the United States, in that it is an arbitrary and unreasonable regulation of common carriers in the conduct of their business, and thus deprives them of their property without due process of law.

6. Said Court, therefore, erred in rendering the final judgment it did render against the plaintiff in error, and which is complained of in this case.

Wherefore, for these and other manifest errors appearing in the record, said Southern Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of North Carolina be reversed, set aside and held for naught, and that judgment be rendered for plaintiff in error, granting it is rights under the Constitution and statutes of the United States, and plaintiff in error also prays for judgment for its costs.

WILLIAM B. RODMAN,
Attorneys for Southern Railway Company.

8 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to D. L. Reid and Etta C. Reid, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of North Carolina, wherein Southern Railway Company, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of North Carolina, this 31 day of Dec., 1910.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

[SEAL.]

Attest:

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court of North Carolina.

I, an attorney of record for the defendants in error in the above-entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

JNO. A. McRAE,
PLUMMER STEWART,
Attorney- for Defendants in Error.

9 The Supreme Court of North Carolina.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
D. L. REID and Wife, ETTA C. REID, Defendants in Error.

Bond.

Know all men by these presents, that we, Southern Railway Company, a corporation of the State of Virginia, the principal office of which is in the City of Richmond, in said State, as Principal, and Illinois Surety Company, as Surety, are held and firmly bound unto D. L. Reid and Etta C. Reid, in the full and just sum of Six hundred 00/100 Dollars ($600.00), for the payment of which sum,

well and truly to be made, we hereby jointly and severally bind ourselves, and each of our successors, firmly by these presents.

Sealed with our seals, and dated this 30th day of December, in the year 1910.

Whereas, lately at a hearing had before the Supreme Court of North Carolina, in a suit depending in said Court between the said D. L. Reid and Etta C. Reid, as plaintiffs, and said Southern Railway Company, as defendant, a final judgment was rendered against the said Southern Railway Company, and Southern Railway Company seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment:

10 Now therefore, the condition of this obligation is such that if the said Southern Railway Company, as plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged against it if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

[Seal Southern Railway Co.]

SOUTHERN RAILWAY COMPANY.
(S.) By H. B. SPENCER, *Vice President.*

Attest:

[SEAL.] (S.) GEO. R. ANDERSON,
Assistant Secretary.

[Seal Illinois Surety Co.]

ILLINOIS SURETY COMPANY.
(S.) By H. B. ANDREWS.

Bond approved, and to operate as a supersedeas.

(S.) WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

11 Superior Court, Mecklenburg County.

D. L. REID and Wife, ETTA C. REID, Plaintiff,
against
THE SOUTHERN RAILWAY COMPANY, Defendant.

Summons.

State of North Carolina, to the Sheriff of Mecklenburg County, Greeting:

You are hereby Commanded in the name of the State to Summons The Southern Railway Company, defendant in the above action to appear at the next term of the Superior Court of the County of Mecklenburg, at the Court House in Charlotte, the second Monday in January, 1908, then and there to answer the complaint of D. L.

Reid and wife, Etta C. Reid, plaintiff in this suit, and you are further commanded to notify said defendant that if he fail to answer said complaint within the time allowed by law, the said plaintiff will demand judgment according to complaint and for all costs and charges in this suit incurred.

Witness, J. A. Russell, clerk of our said Court, at office in Charlotte, this the 18th day of December, 1907.

J. A. RUSSELL,
Clerk Superior Court of Mecklenburg County.

Received December 17th, 1907.
Executed December 20th, 1907.
By delivering a copy of the within summons to D. D. Traywick, agent of the defendant Company, at Charlotte.

N. W. WALLACE, *Sheriff.*

12 D. L. Reid and wife, Etta C. Reid, vs. the Southern Railway Company.—Before me, R. D. Heironimus, a Notary Public, personally appeared D. L. Reid and Etta C. Reid, each of whom being first duly sworn, states for himself and herself, that they, and each of them, have been advised by counsel, learned in the law, that they have a good cause of action vs. the Southern Railway Company, and that they, and each of them, is unable to give bond in the sum of Two Hundred Dollars ($200) or deposit a like sum with the Clerk of the Superior Court for the prosecution of said cause of action.

Wherefore, they, and each of them, pray the Court to authorize them, and each of them, to bring said action vs. the said Southern Railway Company, without giving bond or making deposit as required by Section 450 of the Revisal of North Carolina.

D. L. REID.
ETTA C. REID.

STATE OF WEST VIRGINIA,
Tucker County, To-wit:

Sworn to and subscribed before me this 14th day of December, 1907.

R. D. HEIRONIMUS,
Notary Public.

NORTH CAROLINA,
Mecklenburg County:

D. L. REID and Wife, ETTA C. REID,
vs.
THE SOUTHERN RAILWAY COMPANY.

Whereas, it appears from the oaths of D. L. Reid and wife,
13 Etta C. Reid, that they have a good cause of action vs. the Southern Railway Company, and that they, and each of them, is unable to give bond or to make deposit for the prosecution of said cause of action vs. the Southern Railway Company.

It is, Therefore, ordered that the said D. L. Reid and wife, Etta C. Reid, be allowed to prosecute their said cause of action vs. said Railway Company without giving bond or making deposit, as required by law.

This the 18th day of December, 1907.

J. A. RUSSELL,
Clerk Superior Court.

Complaint.

The plaintiffs, complaining of the defendant, allege as follows:

1. That the defendant, the Southern Railway Company, is a corporation chartered and organized under the laws of the State of Virginia, and is and was at the time hereinafter complained of, engaged in the business of a common carrier of freight and passengers, for hire, in the State of North Carolina, as well as elsewhere; and that the defendant operates a line of railroad in and through the city of Charlotte, North Carolina.

2. That on September the 17th, 1907, the plaintiff, Etta C. Reid, caused to be carried to the freight station of the defendant, the place where freight is usually accepted, in the city of Charlotte, North Carolina, for shipment to San Hammock, at Davis, West Virginia, her household and kitchen furniture, (the plaintiff having arranged to move from Charlotte, North Carolina, to Davis, West Virginia) and offered to prepay the freight upon said household and kitchen furniture to Davis, West Virginia.

14 3. That the freight agent of the defendant at Charlotte, North Carolina, refused to accept said household and kitchen furniture for shipment and issue a bill of lading of the defendant Company therefor, on the ground that he did not know the freight rates to Davis, West Virginia; but on Monday, September 23d, 1907, the said Company did accept said household and kitchen furniture for shipment, as aforesaid, and issued its bill of lading therefor, charging the plaintiffs $34.08 freight thereon; that the plaintiff had daily tendered the freight for shipment each day from September 17, to September 23, inclusive.

4. That the plaintiff, Etta C. Reid's husband, D. L. Reid had already gone to Davis, West Virginia, and that on account of the refusal to accept said household and kitchen furniture, by the defendant, for shipment, as aforesaid, the plaintiff, Etta C. Reid, was forced to remain in the city of Charlotte until after the 23d of September, 1907; and that the plaintiff was put to the expense of sending several telegrams to her husband, the plaintiff, D. L. Reid, and was much annoyed by the wrongful refusal of said defendant Company to accept said freight for shipment.

5. That the plaintiffs are informed and believe that there was on the 17th day of September, 1907, a telegraph office at Davis, West Virginia, and that by this means the defendant could have easily ascertained within a very short while the freight rates on household and kitchen furniture to the desired destination, but willfully refused to do so.

6. That the defendant maintains freight headquarters for the purpose of giving out information as to freight rates over the lines of the defendant and over connecting lines, and that the
15 defendant could easily have obtained the desired information through this source, but willfully refused to do so.

Wherefore, the plaintiffs pray judgment against the defendant for the sum of Three Hundred ($300) Dollars, being a penalty of Fifty ($50) *Fifty* Dollars a day for each of the six days which the defendant refused to accept said freight for shipment, as hereinbefore stated according to the statutes in such cases made and provided.

2. For judgment against the defendant for the sum of One Hundred ($100) Dollars as damage caused to the plaintiffs by loss of time, cost of telegrams, etc., growing out of the defendants failure to accept said freight for shipment as it is and was required by law to do.

STEWART & McRAE,
Attorneys for Plaintiff.

Answer.

The defendant, for answer to the complaint filed herein, says:

1. It admits that it is a corporation originally created, organized and existing under the laws of the State of Virginia, and is now, and was at the time mentioned in the complaint, engaged in the business of a common carrier of passengers and freight for hire, and operate a line of road, from Charlotte, N. C., to the city of Alexandria, in the State of Virginia, to the city of Danville, in the State of Virginia, and to some other places; and do not operate any line of railroad in West Virginia. That it operates a line of railroad in and through the city of Charlotte, state of North Carolina.

16 2. It admits that on September 17th, 1907, the plaintiff, Etta C. Reid, caused to be carried to the freight station of defendant, at which place the defendant usually accepts freight at Charlotte, N. C., for shipment, a lot of household and kitchen furniture. After said lot of household and kitchen furniture had been placed in defendant's depot, in the city of Charlotte, plaintiff, Etta C. Reid, applied to the defendant to issue to her a bill of lading, consigning said household and kitchen furniture to Samuel Hammock, at Davis, W. Va., and demanded of defendant Southern Railway Company, that it receive said freight for shipment, from Charlotte, N. C., to Davis, in the state of West Virginia, and demanded that the Southern Railway Company issue a bill of lading therefor, reading "Etta C. Reid, as consignor; point of origin, Charlotte, N. C.; Samuel Hammock, as consignee, and Davis, West Virginia, as point of destination, to which said freight was to be carried, and it is further admitted that the plaintiff, Etta C. Reid, demanded that the Southern Railway Company inform her what amount of money was necessary to prepay the freight upon the said household and kitchen furniture, from Charlotte, N. C., to Davis, W. Va., so that she could prepay the same, in accordance with her offer.

3. It is admitted that the freight agent of the defendant Southern Railway Company, at Charlotte, N. C., refused to accept said shipment of household goods and kitchen furniture, and to issue a bill of lading therefor, until the rate of freight could be established from Charlotte, N. C., to Davis, West Virginia.

It is admitted that on Monday, September 23d, 1907, after a through and joint rate of freight had been established and
17 filed, in accordance with the law, and when it was lawful for defendant to accept said shipment, the said Company did accept the household and kitchen furniture for shipment from Charlotte, N. C., to Davis, in the state of West Virginia, and issued its bill of lading, therefor, which bill of lading read, "Point of origin, Charlotte, N. C.; consignor Etta C. Reid; final destination, Davis, in the state of West Virginia; consignee, Samuel Hammock"; and collected from the plaintiff the sum of $34.08, the freight on said shipment, in accordance with the joint and through freight rate that had been established in accordance with the request of said plaintiff. The other matters alleged in Section Three of the complaint are denied.

4. This defendant has no knowledge or information sufficient to enable it to form a belief as to the matters alleged in Section Four of the complaint, and denies the same.

5. It admits that on September 17th, 1907, a telegraph office was located in Davis, state of West Virginia. The other matters contained in Section Five of the complaint are denied.

6. It is admitted that the defendant maintained freight headquarters for the purpose of establishing and fixing freight rates over its own line, and upon reasonable request for applying to other lines to establish through and joint rates and to publish the same in accordance with the law. This defendant is advised that it had no right or power to name a rate of freight from the city of Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, for through shipment, until a through and joint rate between the defendant and the other carriers, over whose lines of railroad said shipment would have to move.

18 The other matters contained in Section Six of the complaint are denied.

For a further and separate defense, this defendant, says:

First. That the transportation of freight from the city of Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, would be interstate commerce. That the receipt of a shipment of freight for transportation from Charlotte, N. C., to Davis, in the state of West Virginia, would be an act of interstate commerce. That under the Constitution of the United States, the power to regulate interstate commerce, or commerce between several states, is vested in the Congress of the United States, and under the powers vested in it, under the Constitution of the United States, the Congress of the United States has passed laws regulating commerce between the States or among the several states, and has expressly undertaken to regulate all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or

icing, storage and handling of property transported and to provide that all common carriers by railroad, engaged in interstate commerce, should furnish transportation from one state to another, upon reasonable request therefor, and should establish just rates applicable thereto, and has undertaken to prohibit common carriers by railroad, engaged in interstate commerce, to participate in or engage in the transportation of passengers or property, except in accordance with the said acts of Congress, regulating interstate commerce, and especially the Act to regulate commerce, approved February 4th, 1907, and the Amendment thereto, and especially the Amendments approved June 29th, 1906, and June 30th, 1906.

19 This defendant avers that it was acting in strict accordance with the said laws of the United States and it now claims the benefit and protection of said laws and the Constitution of the United States, under which they were enacted.

Second. That no through and joint rates had been established from Charlotte, N. C., to Davis, W. Va., at the time plaintiff made application to have said shipment made, and this defendant was prohibited by the Constitution and laws of the United States from receiving said shipment of freight and issuing a bill of lading therefor, and naming a charge for which it would transport said freight to Davis, W. Va., until a through and joint rate had been established, in accordance with the said laws of the United States, the benefit and protection of which this defendant now especially sets up and claims.

Third. That Davis, in the state of West Virginia, is a town situated on a branch road of the line of railroad operated by the Western Maryland Railroad Company. This defendant does not connect with the railroad operated by the Western Maryland Railroad Company, and did not know the rates of freight charged by the Western Maryland Railroad Company for transportation over its road; had no arrangement with said Western Maryland Railroad Company for the transportation of freight or the issuing of through bills of lading to points on the Western Maryland Railroad, and especially to points on its branch lines, and no rates had been established to such points, and no rates had been filed or published to such points, and this defendant was, under the Constitution and laws of the United States, prohibited from receiving any shipment of freight, and is-

20 suing a bill of lading therefor, and collecting the freight charges therefor, until such rates had been established and published and filed, in accordance with the law, and this defendant now especially sets up and claims the benefit and protection of the laws of the United States.

Wherefore, defendant prays judgment.

That this action be dismissed.

That the defendant go without day and recover of the plaintiff and the surety upon his prosecution bond, the costs of this action, to be taxed by the Clerk.

(Verified.)

W. B. RODMAN,
Attorney for the Defendant.

Agreed Facts.

The following facts are agreed upon as the facts in this cause, and the cause is submitted to the Court for its decision, upon the following agreed facts:

I.

The Southern Railway Company is a corporation originally created, organized and existing under and by virtue of the laws of the state of Virginia, and is engaged in the business of a common carrier by railroad, and operates a line of railroad, extending from the city of Charlotte, in the state of North Carolina, to the city of Alexandria, in the state of Virginia, and another line to the city of Richmond, in the state of Virginia.

II.

Davis is a town situated in the state of West Virginia, and is the terminus of a branch road of the Western Maryland Railroad
21 Company, which branch road is six miles long, and runs out from a point on the railroad of said Western Maryland Railroad Company, known as Thomas, to Davis.

III.

The Southern Railway Company operates no line of railroad or other means of conveyance to the said town of Davis, in the state of West Virginia, nor does the Southern Railway Company in any way connect with the line of railroad operated by the Western Maryland Railroad Company.

IV.

On the 17th day of September, 1907, Etta C. Reid, caused to be carried to the freight depot of the Southern Railway Company, in the city of Charlotte, in the state of North Carolina, where the defendant Southern Railway Company usually accepts freight for shipment over its line, a lot of household goods and kitchen furniture, and said shipment of household goods and kitchen furniture was placed in said depot.

V.

After said lot of household goods and kitchen furniture had been placed in said depot, at Charlotte, N. C., the plaintiff, Etta C. Reid, demanded of the Southern Railway Company that it receive said goods for carriage to the town of Davis, in the state of West Virginia, a place located on the line of railroad operated by the Western Maryland Railroad Company, and she then and there offered to prepay the said freight charges, and demanded that the
22 Southern Railway Company then and there issue to her a bill of lading covering said shipment of freight, reading from Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, consignee to be Samuel Hammock.

1-21-09. 20) M. R 94313

Form 407
Revised

[BILL OF LADING]

SOUTHERN RAILWAY COMPANY.

L. GREEN, Freight Traffic Manager, Washington, D. C. — RANDALL CLIFTON, Gen. Freight Agent, Atlanta, Ga.
R. L. McKELLAR, Ass't Freight Traffic Manager, Louisville, Ky. — J. J. HOOPER, Freight Claim Agent, Washington, D. C.

NOT NEGOTIABLE. If the word "ORDER" is written immediately before or after the name of the party to whose order the property is consigned, the surrender of this Bill of Lading, properly endorsed, shall be required before the delivery of the property at destination, as provided by Section 8 on the back hereof.

☞ The shipper may elect to accept the conditions printed on the face and/or back hereof, and the reduced rates applying thereunder, or may, as provided below, require the carriage of the property at carrier's liability.

If the shipper elects not to accept the said reduced rates and conditions, he should so notify the agent of the receiving carrier, in writing, at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires the property carried subject to the Standard Bill of Lading conditions in order to secure the reduced rate thereon. Property carried not subject to the conditions of the Standard Bill of Lading will be at the carrier's liability, limited only as provided by Common Law and by the Laws of the United States and of the several States, in so far as they apply. Property thus carried will be charged twenty (20) per cent. higher (subject to a minimum increase of one (1) cent per hundred pounds) than if shipped subject to the conditions of the Standard Bill of Lading.

Received by the SOUTHERN RAILWAY COMPANY

at Charlotte N C Station Sept' 23 1907

from D L Reid Trfr Etta B. Reid

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said carrier agrees to carry to said destination, if on its own road, or otherwise to deliver to another carrier on the route to said destination.

In consideration of the rate charged, under the conditions of this Bill of Lading, it is mutually agreed as to each carrier, severally but not jointly, of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, on the face or back hereof, all of which are agreed to by the shipper as owner or agent for the owner, and accepted for himself or his assigns as just and reasonable.

MARKS AND NUMBERS:	ARTICLES.	WEIGHT (Subject to Correction.)
Consigned Samuel Hancock	Lot of household and	
Davis W Va	Kitchen furniture	3408
DESTINATION. Place Davis W Va		
County	"	
State W Va		
Consignee's address as information only, and not for purposes of delivery		
Route		

Receive, carry and deliver the articles described above, subject to the conditions on the face and/or back hereof; (see ☞ above).

Charges advanced, $ _____ Shipper as owner or agent for the owner.

and _____ $ _____ J. J. Rigler Agent.

(The signature of the Agent here acknowledges only the receipt of the property, and the charges advanced, if any.)

The Blank Spaces Below Must Not Be Filled Up by the Shipper.

The rate of freight from _____ to _____ is in cents:

PER ONE HUNDRED POUNDS.													Per Barrel.	Per _____
If 1½ Times 1st Class	If 1st Class	If 2d Class	If 3d Class	If 4th Class	If 5th Class	If 6th Class	If Class A	If Class B	If Class C	If Class D	If Class E	If Class H	If Class F	If SPECIAL

_____ Agent.

(The signature of the Agent here acknowledges only the rate given.)

Received $ _____ to apply in prepayment of the charges on the property described above.

_____ Agent.

(The signature of the Agent here acknowledges only the amount prepaid.)

P. 23a - #487

Pi 23a

[BILL OF LADING.]

Southern Railway Company.

CONDITIONS.

1. No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damage thereto, by causes beyond its control; or by floods, fire, jettison, ice, collision, delay or quarantine; or by robbers, riots, strikes or stoppage of labor; or by leakage, breakage, chafing, loss in weight, decay, vermin, changes in weather, heat, frost or wet; or for country damage on cotton; or from any cause, if it be necessary or is usual to carry such property upon deck or upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any carrier between the point of shipment and the point to which the rate is given. All additional risks and increased expenses incurred by reason of change of route in cases of necessity, shall be borne by the owner of the goods and be a lien thereon.

3. No carrier shall be liable for loss or damage not occurring on its portion of the route, nor after the said property is ready for delivery to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event. Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property.

4. All property shall be subject to necessary cooperage, baling and repairs at owner's cost. Each carrier over whose route cotton is to be carried hereunder, shall have the privilege of compressing the same, and shall not be held responsible for deviation or unavoidable delays in procuring such compression.

Grain in bulk, consigned to a point where there is an elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered, and placed with other grain of the same kind, without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder. No carrier shall be liable for differences in weights or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination, may be kept in the vessel, car, depot or place of delivery of the carrier, at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges. The carrier may make a reasonable charge per day for the detention of any vessel or car and for the use of tracks after the car has been held forty-eight hours for loading or unloading, and may add such charge to all other charges hereunder and hold said property subject to a lien therefor. Property destined to or taken from a station or wharf at which there is no regularly appointed agent, shall be entirely at risk of owner when unloaded from, or until loaded into, car or vessel; and when received from or delivered on private or other sidings or wharves, shall be at owner's risk until the cars are attached to, and after they are detached from, trains, or until loaded into, and after unloaded from, vessel.

6. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so, and a stipulated value of the articles, are endorsed hereon.

7. Every party, whether principal or agent, shipping inflammable, explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

8. If the word "Order" is written hereon immediately before or after the name of the party to whose order the property is consigned, without any condition or limitation other than the name of a party to be notified of the arrival of the property, the surrender of this bill of lading properly endorsed shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading.

9. Owner or consignee shall pay freight, and average, if any, and all other charges accruing on said property, before delivery, and according to weights as ascertained by any carrier hereunder; and if, upon inspection, it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the tariff rates and under the rules provided for by published classification.

10. This bill of lading is signed for the different carriers who may engage in the transportation, severally but not jointly, each of which is to be bound by and have the benefits of the provisions thereof; and in accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, whether printed or written.

11. If all or any part of said property is carried by water, such water-carriage shall be performed subject to statutory acts and to all the conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier by water shall be liable for any loss or damage resulting from explosion, accidents to boilers or machinery, or from any latent defects in hull, machinery or appurtenances, existing before, at the time, or after shipment or sailing on the voyage, or unseaworthiness, provided the owners have exercised due diligence to make the vessel seaworthy; nor shall negligence be presumed against any carrier.

The carrier shall have liberty to transfer, to tranship, to lighter, to call at any port or ports, to tow and be towed, to deviate, to assist vessels in distress, to navigate without pilots, and to load and discharge goods at any time.

If goods are landed by agreement between any of the parties hereto and carrier at any other than the regular wharf, station or landing of the carrier, each separate package or article shall be at the risk of the owner immediately upon such discharge.

It is agreed that if any goods are sold short of ultimate destination, each carrier that has completed his part of the transportation shall have earned his agreed-upon proportion of the through freight, and the same, with the charges advanced, shall be due and payable out of the proceeds thereof; and for any distance carried, each carrier shall, on the same basis, have earned and be entitled to freight, with charges advanced, for such part of the transportation as has been accomplished.

12. In case of quarantine the goods may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when goods are so discharged, or goods may be returned by carriers at owner's risk and expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required by quarantine regulations or authorities, even though same may have been done by carrier's officers, crew, agents or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

13. Any alteration, addition or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be void.

NOT NEGOTIABLE.

VI.

The said Etta C. Reid proposed to move her residence from the city of Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, and said lot of household goods and kitchen furniture was tendered to defendant Southern Railway Company, in order that the said shipment should be received for transportation from the city of Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, a bill of lading issued therefor, stating Mrs. Etta Reid as the consignor, Charlotte, in the state of North Carolina, as the point of origin, Samuel Hammock as the consignee, Davis, in the state of West Virginia, as the final destination, and that the said household goods and kitchen furniture be transported to its destination.

VII.

Defendant Southern Railway Company, on said 17th day of September, 1907, declined to name a rate of freight to be charged for carrying said lot of household goods and kitchen furniture from Charlotte, in the state of North Carolina, to the town of Davis, in the state of West Virginia; declined to permit plaintiff, Etta C. Reid, to prepay said freight charges from Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia; declined to receive said lot of household goods and kitchen
23 furniture for shipment from the city of Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, and declined to issue a bill of lading therefor.

VIII.

Plaintiff, Etta C. Reid, on Wednesday, September 18th, Thursday, September 19th, Friday, September 20th, Saturday, September 21st, and Monday September 23d, renewed her request to the Southern Railway Company that it receive said shipment for transportation between said points and issue a bill of lading reading Charlotte, in state of North Carolina, as point of origin, Mrs. Etta C. Reid as consignor, Samuel Hammock, as consignee, and Davis, in the state of West Virginia, as final destination.

Defendant Southern Railway Company declined to comply with said demand on Wednesday, September 18th, Thursday, September 19th, Friday, September 20th, and *Thurs*day, September 21st, 1907.

IX.

On Monday, September 23, 1907, Southern Railway Company named the sum of $34.08 as being the amount necessary to prepay the freight on said shipment from Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, and, thereupon said plaintiff, Etta C. Reid, paid said sum to the Southern Railway Company, and Southern Railway Company issued a bill of lading, copy of which is hereto attached, marked Exhibit "A."

(Here follows Bill of Lading marked, p. 23*a*.)

X.

On September 17, 1907, no through and joint rate of freight to be charged for transportation of articles of freight, from
24 Charlotte, N. C., to Davis, West Virginia, had been established by the Southern Railway Company and the Western Maryland Railroad Company, and other roads which said shipment would have to pass over in going from Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, and no such rates had been filed with the Interstate Commerce Commission, and no rate of freight had been established or filed with the Interstate Commerce Commission, or published, covering shipments between said points.

XI.

On September 17, 1907, when plaintiff, Etta C. Reid, applied to the agent of Southern Railway Company, at Charlotte, in the state of North Carolina and demanded that Southern Railway Company receive said household goods and kitchen furniture, and Southern Railway issue a bill of lading, showing Charlotte, N. C., as point of origin, Etta C. Reid, as consignor, Davis, West Virginia, as destination, and Samuel, Hammock as consignee defendants agent advised plaintiff that there was no established rate for such shipments and that no rate had been filed or published, and that he did not know the rate, and that he had no authority to receive said goods, or to receive the freight charges thereon, to destination, and had no authority to issue a bill of lading reading final destination, Davis, in the state of West Virginia.

XII.

Defendants agent on September 17, 1907, wired his Division Freight Agent, the officer having charge of such matters
25 in the territory in which Charlotte is located, to obtain authority to name a through and joint rate of freight, and authority to receive said shipment, and issue a bill of lading therefor, in accordance with the terms of the bill of lading issued on Monday, September 23, 1907. Immediately thereafter the officers of defendant took up with the officers of the railroad companies over whose lines the said shipment of freight would have to move, the establishment of a through and joint rate of freight from Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia. That such rate was established and agent of Southern Railway Company at Charlotte, N. C., was, on Monday, September 23d, 1907, informed of said rate and was given authority to receive said shipment of freight and to issue the bill of lading set out herein and marked Exhibit "A."

XIII.

Thereupon said agent of Southern Railway Company, on Monday, September 23d, 1907, did receive said shipment of freight, which had at all times, since September 17, 1907, been in the depot of defendant at Charlotte, N. C., received the amount of freight, in

accordance with the joint and through rate, which had been established, and issued the bill of lading, set out herein, marked Exhibit "A" and shipment went forward to its destination.

XIV.

There is and was at date of said tender located at Davis, in the state of West Virginia, a telegraph office.

26

XV.

Etta C. Reid remained at Charlotte, N. C., from September 17, 1907, to September 23, 1907, waiting the establishment of said rate, the information to the agent of defendant, and the issuing of the bill of lading.

XVI.

Etta C. Reid's damage, if any is entitled to recover, by reason of said delay in Charlotte, is $25.

Plaintiff, upon the foregoing facts, asks the Court to adjudge as a matter of law that the plaintiff is entitled to recover of defendant Three Hundred Dollars ($300) as penalty for failure to receive said shipment of freight from Tuesday, September 17, 1907, to Monday, September 23, 1907, being $50.00 per day, according to the terms and provisions of Section 2631 of the Revisal of 1905, and the further sum of $25.00, as damages.

Defendant contends and requests the Court to hold:

1st. That defendant was not, and in law could not, be required to issue a bill of lading reading to Davis, West Virginia, a station on a branch line of the railroad, operated by the Western Maryland Railroad Company.

2nd. That Section 2631 of the Revisal of 1905 does not apply to shipments of freight intended to go to points outside of the state of North Carolina, and not on the line of railroad operated by the common carrier to whom the freight is tendered.

3rd. That Section 2631 of the Revisal of 1905, in so far as it undertakes to impose a penalty for failure or refusal to re-

27 ceive a shipment of freight, intended to go from a point in the state of North Carolina, to a point in another state, is a regulation of interstate commerce, is in conflict with the Constitution and laws of the United States, and unconstitutional and void, and this defendant now especially sets up and claims the benefit and protection of the Constitution of the United States, and Laws of United States, enacted by Congress under the powers vested in it.

4th. That Section 2631 of the Revisal of 1905, in so far as it undertakes or attempts to regulate the time and circumstances under which defendant shall be compelled to receive a shipment of freight, to be transported to some state other than the state of North Carolina, is a regulation of interstate commerce, is in conflict with the Constitution and laws of the United States, to-wit: Article I, Section 8, Clause 3, of the Constitution of the United States, and the Acts of Congress, governing and regulating interstate commerce, and the

defendant now especially sets up and claims the benefit and protection of the Constitution and laws of the United States.

5th. That the defendant was, under the Constitution and laws of the United States, expressly prohibited from engaging in or participating in the transportation of freight from one state to another, or from receiving freight to be transported from one state to another, except in accordance with the laws of the United States, as set out in the Act of Congress, entitled, "An Act to Regulate Commerce." Approved February 4, 1887, and the Amendments thereto and especially the Amendment approved June 30, 1906, and that Section 2631 of the Revisal of 1905, is in conflict with said Act, and said Section 2631 of the Revisal of 1905 is unconstitutional and void, and this defendant now especially sets up and claims
28 the benefit and protection of the Constitution and laws of the United States.

6th. That the Act of Congress, entitled "An Act to Regulate Commerce," approved February 4th, 1887, together with the amendments thereto, and especially the amendments approved June 29, 1906, and June 30th, 1906, undertakes to regulate and control all services to be performed by a common carrier, by railroad, of freight from one state to another state, including all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property, and the terms upon which transportation from one state to another state shall be furnished, and that such regulation is exclusive of all regulation of such subjects by the state of North Carolina, that Section 2631 of the Revisal of 1905 is in conflict with the Constitution of the United States, in so far as it attempts to impose a penalty for failure to receive a shipment of freight, going from one state to another, and this defendant respectfully sets up and claims the benefit and protection of said laws.

7th. That defendant was under the Constitution and laws of the United States forbidden to receive said freight, for shipment, and issue a bill of lading therefor, until the rate or rates of freight had been established, filed with the Interstate Commerce Commission, and published according to law, and that plaintiff cannot recover of defendant either penalty or damages for defendants obeying the Constitution and laws of the United States, and defendant
29 especially sets up and claims the benefit and protection of the Constitution and laws of the United States.

STEWART & McRAE,
Attorneys for Plaintiff.
W. B. RODMAN,
Attorney for Defendant.

Judgment.

This cause coming on to be heard before His Honor James L. Webb, Judge Presiding, upon an agreed state of facts between Stewart & McRae, attorneys for the plaintiffs, and W. B. Rodman, attorney for the defendant, and having been heard, and the Court

being of the opinion that the plaintiff, Etta C. Reid, upon said agreed facts, is entitled to judgment against the defendant for penalty of $250.00 and compensatory damages, $25.00:

It is, therefore, hereby ordered, adjudged and decreed that the plaintiff, Etta C. Reid, have and recover of the defendant the sum of $275.00, $250.00 of which amount being penalty of $50.00 per day for refusal to accept tender of freight for shipment on each of 5 different days, and $25.00 compensatory damages, and the costs of this action.

JAS. L. WEBB,
Presiding Judge.

Appeal Entries.

From this judgment, defendant appeals to the Supreme Court. Notice of appeal given in open court, and time waived. Defendant allowed 30 days to make up a case on appeal, and plaintiff allowed 30 days thereafter to make up counter-case. Bond on appeal fixed at Fifty Dollars.

WEBB, *Judge.*

30 *Bond.*

Know all men by these presents: That

Whereas, at the March Term of the Superior Court of Mecklenburg County, a judgment was rendered in this case against the defendant Southern Railway Company; and

Whereas, the Southern Railway Company has given notice of an appeal from the said judgment of the Superior Court of Mecklenburg county, to the Supreme Court of North Carolina; and

Whereas, as a condition precedent to said appeal, the Southern Railway Company is required to give bond in the sum of Fifty Dollars ($50.00) to pay all such costs as may be adjudged against it on said appeal.

Now, therefore, we, the Southern Railway Company, as principal, and J. C. Wallace, as surety, acknowledge ourselves indebted to D. L. Reid, in the sum of Fifty Dollars ($50.00).

The condition of the foregoing obligation is such that if the said Southern Railway Company shall well and truly pay all such costs as may be adjudged against it on said appeal, then this obligation to be void; otherwise, to remain in full force and effect.

In witness whereof, the Southern Railway Company has caused these presents to be executed by W. B. Rodman, its attorney, and the said J. C. Wallace has hereunto set his hand and seal this the 21st day of September, 1910.

SOUTHERN RAILWAY COMPANY,
By W. B. RODMAN, *Attorney.*
JNO. C. WALLACE. [SEAL.]

31 *Case on Appeal.*

This was a civil action, heard before His Honor, Jas. L. Webb, Judge Presiding at the March Term, 1910, of the Superior Court of Mecklenburg county. The cause was heard upon an agreed state of facts, which said facts were as follows:

I. The Southern Railway Company is a corporation originally created, organized and existing under and by virtue of the laws of the state of Virginia, and is engaged in the business of a common carrier by railroad, and operates a line of railroad, extending from the city of Charlotte, in the state of North Carolina, to the city of Alexandria, in the state of Virginia, and another line to the city of Richmond in the state of Virginia.

II. Davis is a town situated in the state of West Virginia, and is the terminus of a branch road of the Western Maryland Railroad Company, which branch road is six miles long, and runs out from a point on the railroad of said Western Maryland Railroad Company, known as Thomas, to Davis.

III. The Southern Railway Company operates no line of railroad or other means of conveyance to the said town of Davis, in the state of West Virginia, nor does the Southern Railway Company in any way connect with the line of railroad operated by the Western Maryland Railroad Company.

IV. On the 17th day of September, 1907, Etta C. Reid, caused to be carried to the freight depot of the Southern Railway Company, in the city of Charlotte in the state of North Carolina, where the defendant Southern Railway Company usually accepts freight for shipment over its line, a lot of household goods and kitchen
32 furniture, and said shipment of household goods and kitchen furniture was placed in said depot.

V. After said lot of household goods and kitchen furniture had been placed in said depot, at Charlotte, N. C., the plaintiff, Etta C. Reid, demanded of the Southern Railway Company that it receive said goods for carriage to the town of Davis, in the state of West Virginia, a place located on the line of railroad operated by the Western Maryland Railroad Company, and she then and there offered to prepay the said freight charges, and demanded that the defendant Southern Railway Company, then and there, issue to her a bill of lading covering said shipment of freight, reading from Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, consignee to be Samuel Hammock.

VI. The said Etta C. Reid proposed to move her residence from the city of Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, and said lot of household goods and kitchen furniture was tendered to defendant Southern Railway Company, in order that the said shipment should be received for transportation from the city of Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, a bill of lading issued therefor, stating Mrs. Ella Reid as the consignor, Charlotte, in the state of North Carolina, as the point of origin, Samuel Hancock as

the consignee, Davis, in the state of West Virginia, as the final destination, and that the said household goods and kitchen furniture be transported to its destination.

VII. Defendant Southern Railway Company, on said 17th day of September, 1907, declined to name a rate of freight to be
33 charged for carrying said lot of household goods and kitchen furniture from Charlotte, in the state of North Carolina, to the town of Davis, in the state of West Virginia, declined to permit plaintiff, Etta C. Reid, to prepay said freight charges from Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia; declined to receive said lot of household goods and kitchen furniture for shipment from the city of Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, and declined to issue a bill of lading therefor.

VIII. Plaintiff, Etta C. Reid, on Wednesday, September 18th, Thursday, September 19th, Friday, September 20th, Saturday, September 21st, and Monday, September 23d, renewed her request to the Southern Railway Company that it received said shipment for transportation between said points and issue a bill of lading reading Charlotte, in state of North Carolina, as point of origin, Mrs. Etta C. Reid, as consignor, Samuel Hammock, as consignee, and Davis, in the state of West Virginia, as final destination.

Defendant Southern Railway Company declined to comply with said demand on Wednesday, September 18th, Thursday, September 19th, Friday, September 20th, and Saturday, September 21st, 1907.

IX. On Monday, September 23d, 1907, Southern Railway Company named the sum of $34.08 as being the amount necessary to prepay the freight on said shipment from Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, and, thereupon said plaintiff, Etta C. Reid, paid the sum to the Southern Railway Company, and Southern Railway Company issued a bill of lading, copy of which is hereto attached, marked Exhibit "A."

34 X. On September 17, 1907, no through and joint rate of freight to be charged for transportation of articles of freight from Charlotte, N. C., to Davis, West Virginia, had been established by the Southern Railway Company and the Western Maryland Railroad Company, and other roads which said shipment would have to pass over in going from Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, and no such rates had been filed with the Interstate Commerce Commission, or published, covering shipments between said points.

XI. On September 17, 1907, when plaintiff, Etta C. Reid, applied to the agent of Southern Railway Company, at Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, and demanded that Southern Railway Company receive said household goods and kitchen furniture and Southern Railway Company issues a bill of lading, showing Charlotte, N. C., as point of origin, Etta C. Reid as consignor, Davis, West Virginia, as destination, and Samuel Hammock as consignee defendants agent advised plaintiff that there was no established rate for such shipments and that no

rate had been filed or published, and that he did not know the rate, and that he had no authority to receive said goods, or to receive the freight charged thereon, to destination, and had no authority to issue a bill of lading reading final destination Davis, in the state of West Virginia.

XII. Defendants agent on September 17, 1907, wired his Division Freight Agent, the officer having charge of such matters in the territory in which Charlotte is located, to obtain authority to name a through joint rate of freight, and authority to receive said
35 shipment, and issue a bill of lading therefor, in accordance with the terms of the bill of lading issued on Monday, September 23, 1907. Immediately thereafter the officers of defendant took up with the officers of the railroad companies over whose lines the said shipment of freight would have to move, the establishment of a through and joint rate of freight from Charlotte, in the State of North Carolina, to Davis, in the State of West Virginia. That such rate was established and agent of Southern Railway Company, at Charlotte, N. C., was, on Monday, September 23, 1907, informed of said rate and was given authority to receive said shipment of freight and to issue the bill of lading set out herein and marked Exhibit "A."

XIII. Thereupon said agent of Southern Railway Company, on Monday, September 23, 1907, did receive said shipment of freight, which had at all times, since September 17, 1907, been in the depot of defendant at Charlotte, N. C., received the amount of freight in accordance with the joint and through rate, which had been established, and issued the bill of lading, set out herein, marked Exhibit "A," and shipment went forward to its destination.

XIV. There is and was at date of said tender, located at Davis, in the State of West Virginia, a telegraph office.

XV. Etta C. Reid remained at Charlotte, N. C., from September 17, 1907, to September 23, 1907, waiting the establishment of said rate, the information to the agent of defendant, and the issuing of the bill of lading.

XVI. Etta C. Reid's damage, if any, she is entitled to recover by reason of said delay in Charlotte, is $25.00.

36 Plaintiff, upon the foregoing facts, asks the Court to adjudge as a matter of law that the plaintiff is entitled to recover of defendant Three Hundred Dollars ($300.00) as penalty for failure to receive said shipment of freight from Tuesday, September 17, 1907, to Monday September 23, 1907, being $50.00 per day, according to the terms and provisions of Section 2631 of the Revisal of 1905, and the further sum of $25.00, as damages.

Defendant contends and requests the Court to hold:

1st. That defendant was not, and in law could not be required to issue a bill of lading reading to Davis, West Virginia, a station on a branch line of the railroad, operated by the Western Maryland Railroad Company.

2nd. That Section 2631 of the Revisal of 1905 does not apply to shipments of freight intended to go to points outside of the State of

North Carolina, and not on the line of railroad operated by the common carrier to whom the freight is tendered.

3rd. That Section 2361 of the Revisal of 1905, in so far as it undertakes to impose a penalty for failure or refusal to receive a shipment of freight, intended to go from a point in the State of North Carolina, to a point in another State, is a regulation of interstate commerce, is in conflict with the Constitution and laws of the United States, and unconstitutional and void, and this defendant now especially sets up and claims the benefit and protection of the Constitution of the United States, and laws of the United States, enacted by Congress under the powers vested in it.

4th. That Section 2631 of the Revisal of 1905, in so far as
37 it undertakes or attempts to regulate the time and circumstances under which defendant shall be compelled to receive a shipment of freight, to be transported to some state other than the state of North Carolina, is a regulation of interstate commerce, is in conflict with the Constitution and laws of the United States, to-wit.—Article 1, Section 8, Clause 3 of the Constitution of the United States, and the Acts of Congress, governing and regulating interstate commerce, and the defendant now especially sets up and claims the benefit and protection of the Constitution and laws of the United States.

5th. That the defendant was, under the Constitution and laws of the United States, expressly prohibited from engaging in or participating in the transportation of freight from one state to another, or from receiving freight to be transported from one State to another, except in accordance with the laws of the United States, as set out in the Act of Congress, entitled "An Act to Regulate Commerce," approved February 4th, 1887, and the Amendments thereto, and especially the Amendment approved June 30th, 1906; and that Section 2631 of the Revisal of 1905 is in conflict with said Act, and said Section 2631 of the Revisal of 1905 is unconstitutional and void and this defendant now especially sets up and claims the benefit and protection of the Constitution and laws of the United States.

6th. That the Act of Congress, entitled "An Act to Regulate Commerce," approved February 4th, 1887, together with the Amendments thereto, and especially the amendments approved June 29, 1906, and June 30th, 1906, undertakes to regulate and control all services to
be performed by a common carrier, by railroad, of freight
38 from one state to another state, including all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property, and the terms upon which transportation from one state to another state shall be furnished, and that such regulation is exclusive of all regulation of such subjects by the State of North Carolina; that Section 2631 of the Revisal of 1905 is in conflict with the Constitution of the United States, in so far as it attempts to impose a penalty for failure to receive a shipment of freight, going from one state to another, and this defendant respectfully sets up and claims the benefit and protection of said laws.

7th. That defendant was under the Constitution and laws of the

United States forbidden to receive said freight, for shipment, and issue a bill of lading therefor, until the rate or rates of freight had been established, filed with the Interstate Commerce Commission, and published according to law, and that plaintiff can not recover of defendant either penalty or damages for defendant's obeying the Constitution and laws of the United States, and defendant especially sets up and claims the benefit and protection of the Constitution and laws of the United States.

Upon the admitted facts in this cause, set out in the case agreed, the Court rendered judgment against the defendant and in favor of the plaintiff, as set out in the record.

From this judgment the defendant excepted and appealed to the Supreme Court of North Carolina, and upon such appeal assigned as grounds of error:

First Assignment of Error.

39 That the defendant was not, and in law, could not be required to issue a bill of lading reading to Davis, W. Va., a station on a branch line of the railroad, operated by the Western Maryland Railway Company.

Second Assignment of Error.

That Section 2631 of the Revisal of 1905, does not apply to shipments of freight intended to go to points outside of the State of North Carolina, and not on the line of railroad, operated by the common carrier to whom the freight is tendered.

Third Assignment of Error.

That Section 2631 of the Revisal of 1905, in so far as it undertakes to impose a penalty for failure or refusal to receive a shipment of freight, intended to go from a point in the State of North Carolina, to a point in another State, is a regulation of interstate commerce, is in conflict with the Constitution and laws of the United States, and unconstitutional and void, and this defendant now especially sets up and claims the benefit and protection of the Constitution of the United States and laws of the United States, enacted by Congress under the powers vested in it.

Fourth Assignment of Error.

That Section 2631 of the Revisal of 1905, in so far as it undertakes or attempts to regulate the time and circumstances under which defendant shall be compelled to receive a shipment of freight, to be transported to some other point in some other state than the State of North Carolina, is a regulation of interstate commerce, is in
40 conflict with the Constitution and laws of the United States, to-wit, Section 8, Article 1, Clause 3, of the Constitution of

the United States, and the Acts of Congress governing and regulating interstate commerce, and the defendant now especially sets up and claims the benefit and protection of the laws of the United States.

Fifth Asignment of Error.

That the defendant was, under the Constitution and laws of the United States, expressly prohibited from engaging in or participating in the transportation of freight from one state to another, or from receiving freight to be transported from one state to another, except in accordance with the laws of the United States, as set up in the Act of Congress, entitled "An Act to Regulate Commerce," approved February 4th, 1887, and the amendments thereto, and especially the Amendment approved June 30th, 1906; and that Section 2631 of the Revisal of 1905 is in conflict with said Act, and said Section 2631 of the Revisal of 1905, is unconstitutional and void, and this defendant now especially sets up and claims the benefit and protection of the Constitution and laws of the United States.

Sixth Assignment of Error.

That the Act of Congress, entitled "An Act to Regulate Commerce" approved February 4th, 1887, together with the amendments thereto, and especially the amendment approved June 29th, 1906, and June 30th, 1906, undertakes to regulate and control all services to be performed by a common carrier, by railroad, of freight from one state to another state, including all services in connection
41 with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property, and the terms upon which transportation from one state to another state shall be furnished, and that such regulation is exclusive of all regulation of such subjects by the State of North Carolina, that Section 2631 of the Revisal of 1905 is in conflict with the Constitution of the United States, in so far as it attempts to impose a penalty for failure to receive a shipment of freight, going from one state to another, and this defendant respectfully sets up and claims the benefit and protection of said laws.

Seventh Assignment of Error.

That defendant was, under the Constitution and laws of the United States forbidden to receive said freight, for shipment, and issue a bill of lading therefor, until the rate or rates of freight had been established, filed with the Interstate Commerce Commission, and published according to law, and that plaintiff can not recover of defendant either penalty or damages for defendant's obeying the Constitution and laws of the United States, and defendant especially sets up and claims the benefit and protection of the Constitution and laws of the United States.

The defendant, having in open court excepted to the judgment of

the Court, and prayed an appeal to the Supreme Court of North Carolina, and notice having been given in open court and waived, an appeal bond in the sum of Fifty Dollars ($50.00) was adjudged sufficient.

The defendant now assigns as grounds of error the following:

First. That the defendant was not, and in law could not,
42 be required to issue a bill of lading, reading to Davis, West Virginia, a station on a branch line operated by the Western Maryland Railroad Company.

Second. That Section 2631 of the Revisal of 1905 does not apply to shipments of freight intended to go to points outside of the State of North Carolina, and not on the line of the railroad operated by the common carrier to whom the freight is tendered.

Third. That Section 2631 of the Revisal of 1905, in so far as it undertakes to impose a penalty for failure or refusal to receive a shipment of freight intended to go from a point in the State of North Carolina, to a point in another State, is a regulation of interstate commerce, is in conflict with the Constitution and laws of the United States and is unconstitutional and void, and this defendant now especially sets up and claims the benefit and protection of the Constitution of the United States and laws of the United States enacted by Congress under the powers vested in it.

Fourth. That Section 2631 of the Revisal of 1905, in so far as it undertakes or attempts to regulate the time and circumstances under which defendant shall be compelled to receive a shipment of freight, to be transported to some state other than the State of North Carolina, is a regulation of interstate commerce; is in conflict with the Constitution and laws of the United States, to-wit, Article I, Section 8, Clause 3, of the Constitution of the United States, and the Acts of Congress, governing and regulating interstate commerce, and the defendant now especially sets up and claims the benefit and pro-
43 tection of the Constitution and laws of the United States.

Fifth. That the defendant was, under the Constitution and laws of the United States, expressly prohibited from engaging in or participating in the transportation of freight from one state to another, or from receiving freight to be transported from one state to another, except in accordance with the laws of the United States, as set out in the Act of Congress, entitled "An Act to Regulate Commerce," approved February 4th, 1887, and the Amendments thereto, and especially the Amendment approved June 30th, 1906, and that Section 2631 of the Revisal of 1905 is in conflict with said Act, and said Section 2631 of the Revisal of 1905 is unconstitutional and void, and this defendant now especially sets up and claims the benefit and protection of the Constitution and laws of the United States.

Sixth. That the Act of Congress, entitled "An Act to Regulate Commerce," approved February 4th, 1887, together with the amendments thereto and especially the amendments approved June 29, 1906, and June 30th, 1906, undertakes to regulate and control all services to be performed by a common carrier, by railroad, of freight from one state to another state, including all services in connection with the receipt, delivery, elevation, and transit, ventilation, refriger-

ation or icing, storage and handling of property, and the terms upon which transportation from one state to another state shall be furnished, and that such regulation is exclusive of all regulation of such subjects by the State of North Carolina; that Section 2631 of the Revisal of 1905 is in conflict with the Constitution of the United States, in so far as it attempts to impose a penalty for failure
44 to receive a shipment of freight, going from one state to another, and this defendant respectfully sets up and claims the benefit and protection of said laws.

Seventh. That defendant was, under the Constitution and laws of the United States, forbidden to receive said freight, for shipment, and issue a bill of lading therefor, until the rate or rates of freight had been established, filed with the Interstate Commerce Commission, and published according to law, and that plaintiff can not recover of defendant either penalty or damages for defendant's obeying the Constitution and laws of the United States and defendant especially sets up and claims the benefit and protection of the Constitution and laws of the United States.

W. B. RODMAN,
Attorney for Defendant.

Foregoing is agreed on as the case on appeal to the Supreme Court. This October 7th, 1910.

STEWART & McRAE,
Attorneys for Plaintiff.
W. B. RODMAN,
Attorney for Defendant.

NORTH CAROLINA,
Mecklenburg County:

I, J. A. Russell, Clerk Superior Court, in and for said County and State, hereby certify that the foregoing is a true and perfect transcript of all records, papers and proceedings had in this court in the case entitled D. L. Reid and wife, Etta C. Reid vs. Southern Railway Co., as the same appear of record and on file in my office.

Witness my hand and official seal, this October 5, 1910.

J. A. RUSSELL,
Clerk Superior Court.
By P. S. MOODY, *D. C.*

(*Docket Entries in Supreme Court of North Cardolina.*)

45 Appeal of defendant docketed Nov. 5, 1910; argued Nov. 16, 1910, by Stewart & McRae for plaintiffs; Wm. B. Rodman for defendant.

46 Opinion of the court delivered Nov. 30, 1910, by Clark, C. J., as follows:

On 17 Sept. 1907 the feme plaintiff tendered to the defendant at its freight depot in Charlotte, N. C., a lot of household goods

for shipment to Davis, West Virginia, a station on the West Maryland R. R. She offered to prepay the freight charges, and asked for bill of lading. The defendant declined to receive said goods for shipment, as requested. Again on the 18, 19, 20, 21 and 23 Sept.. she renewed her requests to the defendant to receive said freight for shipment, as above stated but the defendant refused to accept same until 23 Sept. 1907, when it informed the plaintiff that the amount necessary to prepay the freight was $34.08. The plaintiff thereupon paid the same, and the defendant then accepted said freight for shipment, and issued a bill of lading therefor.

On Sept. 17 when the plaintiff first tendered the goods and demanded the bill of lading, the defendant's agent informed the plaintiff that there was no established rate for shipment to Davis, West Virginia, and that none had been filed or published, and that he had no authority to receive said goods. Said agent on that day wired the proper authority to obtain the freight rate and for permission to receive said shipment. On 23 Sept. he received such information and permission, and thereupon accepted the freight and issued a bill of lading therefor. At the date of said tender, on 17 Sept. there was a telegraph office at Davis, West Virginia. The plaintiff remained at Charlotte from 17 Sept. to 23 Sept. waiting the shipment of said household goods.

The above facts were agreed and it was further agreed that the plaintiff's damage, if she is entitled to recover any, by reason of said delay in Charlotte was $25.00.

Upon the facts agreed the Judge rendered judgment for $250.00 being penalty of $50 per day for refusal to accept freight tendered for shipment on each of 5 different days, and $25.00 compensatory damages, and the cost of this action. The defendant appealed.

47

CLARK, C. J. The defendant contends that Rev. 2631 is invalid, so far as it undertakes to impose a penalty on a common carrier for refusing to receive a shipment of freight from one State to another, but concedes that this Court has heretofore decided this point against it. In Lumber Co. v. R. R. 152 N. C. 72 it is said "We have repeatedly passed against this contention. The defendant's brief admits this, and cites eight decisions of this Court which it asks us to overrule. In one of the latest of these Reid v. R. R. 149 N. C. 423 the authorities were reviewed, and the Court said 'The defendant contends, that Rev. 2631 giving a penalty for refusing to accept freight for shipment is unconstitutional when the freight is to be shipped into another State. But refusing to receive for shipment is an act wholly done within this State; is not a part of the act of transportation, and our penalty statute applies.'" The Court then cited Bagg v. R. R. 109 N. C. 279; Currie v. R. R. 135 N. C. 536, both of which had been cited, and re-affirmed by Walker, J. in Walker v. R. R. 137 N. C. 168. In Twitty v. R. R. 141 N. C. 355 Brown J. held that where the agent refused to give the bill of lading because he did not know what the freight rates were, this was a refusal to receive for transportation and the carrier was re-

sponsible for the penalty, even though he put the goods in the warehouse. In Harrill v. R. R., 144 N. C. 532, Walker, J. held that a penalty for failure to deliver freight, was valid though the freight was interstate. There the penalty was incurred after transportation had ceased. Here the penalty occurred before the transportation had been begun, and before the freight was received or accepted for transportation.

Reid v. R. R. was again before the Court 150 N. C. 753 and was re-affirmed Hoke, J. citing Morris v. Express Co. 146 N. C. 167 which held "The State may, in the absence of express action by Congress or by the Interstate Commerce Commission, regulate for the benefit of its citizens local matters indirectly affecting interstate commerce," and cited as sustaining that position R. R. v. Flour Mill 211 U. S. 612 which laid down the same proposition in
48 a case which involved the right of the State Court to compel a Railroad Co. to place cars on a siding for the convenience of a flouring mill engaged in making shipments in interstate commerce.

The above decisions were followed by Connor J., in Garrison v. R. R. 150 N. C. 575, 592, with a full review of the authorities and no dissent. In fact, the duty to receive freight "whenever tendered" was a common law duty. Alsop v. Express Co. 104 N. C. 278 which was cited and approved in Garrison v. R. R. supra 582.

Interstate Commerce does not begin "until the articles have been shipped or stated for transportation from one State to the other" was said by Bradley, J. in Coe v. Errol 116 U. S. 517, citing In re Daniel Ball, 10 Wall 565: which has since been cited with approval in Match Co. v. Ontonagon 188 U. S. 94. The statutory enforcement, under penalty of the common law duty to accept freight "whenever tendered" is not within the scope or terms of any act of Congress. It is neither an interference with nor a burden upon interstate commerce.

The second point the defendant makes is that it could not receive for shipment freight going from one State to another, until the rates of freight to such points had been filed with the interstate commerce Commission, as required by the U. S. statute. The defendant's brief concedes that this point also has been held against him by this Court. The act of Congress, the Interstate Commerce Act sec. 6 provides: "Every common carrier, subject to the provisions of this act, shall file with the Commission created by this act, print and keep open to public instruction schedules showing all the rates, fares and charges for transportation between different points on its own route, and between points on its own route and points on the route of any other carrier by R. R., by pipe line or by water, "when a through route and joint rate have been established." If no through route and joint rate from Charlotte to Davis West Virginia had been established, it was not therefore prohibited to the defendant to receive this freight. It can not be expected that a freight rate to every R. R. station in the Union from Charlotte must be established and published before the
49 R. R. can receive freight for any point outside this State, at Charlotte. The Federal statute does not prohibit the receipt

or forwarding of a single shipment, but forbids the carrier to "engage or participate in the transportation of passengers or property," interstate, without filing its rates. It is the business of a common carrier which the defendant is forbidden to exercise without filing its rates. The statute has no application to this case, where the defendant was carrying on such business, presumptively, at least, under the authority of law. Harrill v. R. R. 144 N. C. 540. If however, the defendant was in default in not having complied with the Federal statute to establish and post its rates, this would not be a defense to its other default in failing to comply with its common law duty to receive all freight when tendered, under penalty prescribed by a State statute.

Besides, there was nothing which prevented the defendant from accepting the freight to be shipped to the end of its line, there to be delivered to other carriers to be transported to Davis, W. Va. This it actually did when it finally received this freight and gave its bill of lading therefor on 23 Sept. The bill of lading recites the receipt of the freight in good order, marked as destined for Davis W. V. and stipulates "which said carrier agrees to carry to its said destination, if on its own road, or otherwise to deliver to another carrier on the route to said destination." There was no reason why the defendant could not have received this freight on the very first day it was tendered, as it was its duty to do, and have given a bill of lading in the identical words that it gave on 23 Sept. It could have shipped the goods and made the freight payable at destination or it could have foregone the receipt of freight till it could have ascertained by wire the amount thereof, which could have been done while the goods were proceeding on their way. The plaintiff did not demand prepayment of freight, as the condition precedent to acceptance of the goods. She merely offered to prepay.

In Twitty v. R. R. 141 N. C. 355, Brown J. says "The fact that the agent did not know the freight rates is no excuse. It is his duty to know them. At least, he could readily have telegraphed and
50 ascertained and need not have refused to give a bill of lading on that account." So, here, it is no defense that the defendant had not established its rates. It was its duty to have done so. It could have received and shipped the freight and ascertained the rates while the goods were in transit. It could not plead its default to the U. S. government as a defense for its default in its duty to the plaintiff. Currie v. R. R. 135 N. C. 537; Bagg v. R. R. 109 N. C. 279, 26 Am. St. 569, 14 L. R. A. 596.

In Tel. Co. v. James 162 U. S. 650 a State statute was held valid which required telegraph Cos. to receive and deliver promptly all telegrams and it was held that this applied to interstate messages. This has been quoted and approved in R. R. v. Flour Mills 211 U. S. 622. It was held in Tel. Co. v. James that a State statute was not void as affecting interstate commerce, unless "it necessarily affected the conduct of the carrier, and regulated him in the performance of his duties outside and beyond the limits of the State enacting the law." But the State statute is valid if it "can be fully carried out and obeyed without in any manner affecting the conduct of the

company with regard to the performance of its duties in other States, and would not favorably affect or embar-ass it in the course of its employment and hence until Congress speaks upon the subject it would seem that such a statute must be valid."

In Morris v. Express Co. 146 N. C. 167 this Court held valid Rev. 2634 imposing a penalty for failure to adjust and pay in 90 days a valid claim for damages to goods shipped from points without the State. In a very recent case Chief Justice Fuller in R. R. v. Mazursky 216 U. S. 122 held exactly the same proposition, approving what had been said by Mr. Justice Peckham, Tel. Co. v. James supra.

And finally the defendant objects that by reason of Sec. 20 of the Interstate Commerce act the initial carrier who issues a bill of lading is liable for the default not only of itself but of each of the successive carriers to the point of destination, and therefore the State ought not to compel it to issue a bill of lading. It seems to question the
51 constitutionality of the act of Congress. The act of Congress is merely declaratory of what was the common law in this respect and has been held constitutional in Smeltzer v. R. R. 158 Federal 649, R. R. v. Crenshaw (Ga.) 63 S. E. 865. The defendant having held itself out as a common carrier was liable if it refused to receive and carry goods for points beyond its own line, R. R. v. Wolcott 141 Ind. 280; R. R. v. Morton 61 Ind. 577. But whether such act of Congress is valid or invalid does not arise in this case. If invalid, the defendant could have received the goods and asserted its liability only to the extent of damages received on its own line, as it actually did in the bill of lading which it issued when it received these goods on 23 Sept. But if the act is constitutional, the defendant could not on that account delay or decline to receive this shipment as long as it was in the business of a common carrier, and carrying goods for other shippers to be transported to points outside the State. Unless the act of Congress is constitutional "The mere designation of the destination of the goods in the contract with the first carrier will not make it a contract for through transportation, where the other terms indicate a limitation of liability to the end of the contracting carrier's line." 6 Cyc. 481; Phillips v. R. R. 78 N. C. 294. This question, as already said, does not arise in this case, and if it did it would in no wise affect the duty of the defendant to receive the plaintiffs' goods when tendered for shipment. The measure of responsibility, for damages if any should arise, is entirely separate and apart from the duty to accept and ship the goods.

No error.

52 #424, Mecklenburg.

D. L. REID & WIFE
v.
SOUTHERN RAILWAY CO.

BROWN, *J.* (dissenting):

There are two questions presented by this appeal.

1. When the plaintiff tendered her goods for shipment from

Charlotte N. C. to Davis West Va. and demanded a bill of lading, was the transaction one of interstate commerce, so as to exclude the imposition of penalties under the State law?

2. Can the State penalize the defendant for refusing to give a bill of lading to Davis West Va., a point beyond its own line, and to which point it had made and published no rates?

These questions are discussed in my dissenting opinion in Burlington Lumber Co. 152 N. C., 76 and for the reasons given therein I cannot concur in the judgment of this Court.

The case of Twitty v. Southern Railway Co. 141 N. C. 356, in which I wrote the opinion of the Court is cited as authority for the ruling in this case. In the Twitty case the shipment tendered was from Rutherfordton N. C. to Hendersonville N. C. points in same State and on defendant's line of railway.

I think a cursory reading of the facts of the case and the opinion of the Court will disclose that the case has no application here.

53 Harrill v. Railway Co., 144 N. C., 532 likewise has no application to this case, for there the transportation had been completed and there was nothing to do but to deliver the goods. There was no regulation of commerce or anything which was calculated to embarrass or impede the railroad company in the performance of its duty as an interstate carrier. That case was governed by the decision in Telegraph Co. v. James, 162 U. S., 650. The Company was not required to receive and carry goods beyond the State but merely to deliver those which it had brought into it. The distinction between the two cases is apparent.

Mr. Justice Walker concurred in the dissenting opinion.

54 Supreme Court of North Carolina, August Term, 1910.

D. L. REID and WIFE
v.
SOUTHERN RAILWAY CO.

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Mecklenburg County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court. It is therefore considered and adjudged by the court here, that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed. And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this court incurred to-wit the sum of Thirteen 05/100 Dollars ($13.05) and execution issue therefor.

[L. S.] THOS. S. KENAN, *S. C. C.*

55 Supreme Court of North Carolina.

I, Thos. S. Kenan, clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and correct copy of the record in the action lately pending in this court wherein D. L. Reid and wife were plaintiffs and Southern Railway Co. was defendant, as appears from the records of this court.

Given under my hand and seal of said court at office in Raleigh on this the 6th. day of January A. D. 1911.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk of the Supreme Court of North Carolina.

Endorsed on cover: File No. 22,482. North Carolina Supreme Court. Term No. 487. Southern Railway Company, plaintiff in error, vs. D. L. Reid and Etta C. Reid, his wife. Filed January 16th, 1911. File No. 22,482.

(21,739.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 80.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

C. C. REID AND EDWARD BEAM, COPARTNERS UNDER THE FIRM-NAME OF REID & BEAM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 11, 1911.

1 The Supreme Court of North Carolina.

REID & BEAM, Plaintiffs,
v.
SOUTHERN RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

Southern Railway Company, the above named defendant, respectfully shows that on the twenty-fifth day of May in the year 1909, the Supreme Court of North Carolina, which is the highest court in that State in which a decision in the action referred to herein could be had, rendered a judgment against your petitioner in a certain action in which C. C. Reid and Edward Beam, co-partners under the firm name of Reid & Beam, were plaintiffs, and your petitioner, Southern Railway Company, was defendant.

In said action there was drawn in question, by your petitioner, the validity, as applied to this case, of a statute of, or an authority exercised under, the State of North Carolina, to-wit, Section 2631 of the North Carolina Revisal of 1905, on the ground of its being repugnant to the Constitution, and to the laws, of the United States, and the decision of the Supreme Court of North Carolina was in favor of its validity; and in said action a right, privilege or immunity was specially set up and claimed by your petitioner under the Constitution, and under a statute, of the United States, and the decision of the Supreme Court of North Carolina was against the right, privilege or immunity so set up and claimed; all of which will more fully and in detail appear from the assignment of errors filed herein.

Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of North Carolina in ren-
2 dering judgment against it in this action, it respectfully prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correcting of the errors complained of; that an order may be entered fixing the amount of a supersedeas bond herein; that a duly authenticated transcript of the record and proceedings herein in said Supreme Court of North Carolina may be sent to the Supreme Court of the United States; and that the decision and judgment of the Supreme Court of North Carolina herein may be reversed and annulled.

ALFRED P. THOM,
WILLIAM B. RODMAN,
Attorneys for Southern Railway Company.

STATE OF NORTH CAROLINA,
Supreme Court, To wit:

Let the writ of error above prayed for issue, upon the execution of a bond by Southern Railway Company payable to Reid & Beam, a

co-partnership composed of C. C. Reid and Edward Beam, in the sum of Five Hundred dollars, such bond when approved to act as a supersedeas.

9 June 1909.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

3 Supreme Court of the State of North Carolina.

REID & BEAM, Plaintiffs,
v.
SOUTHERN RAILWAY COMPANY, Defendant.

Assignment of Errors for the Supreme Court of the United States.

This was an action instituted by the plaintiffs, Reid & Beam, under Section 2631 of the North Carolina Revisal of 1905, to recover of the defendant Southern Railway Company a penalty denounced by said section for alleged failure to receive and forward a car load of shingles. The section referred to is as follows:

"2631. Penalty for Failure to Receive. Agents or other officers of railroads and other transportation companies whose duty it is to receive freight shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or workhouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment."

The shipment which it is alleged by plaintiffs the defendant company failed to receive and forward was a car load of shingles tendered by the plaintiffs, after being loaded on a car, and which the
4 plaintiffs requested the defendant to issue its bill of lading for, and to transport from Rutherfordton in the State of North Carolina to a place called Scottville in the State of Tennessee, being, therefore, an interstate shipment.

Southern Railway Company, defendant in the court below, and plaintiff-in-error in the Supreme Court of the United States, respectfully assigns as errors in the record and proceedings in this cause in the Supreme Court of North Carolina, the following:

1. The Supreme Court of North Carolina erred in holding that Section 2631 of the North Carolina Revisal of 1905, above referred

to, is, as applied to the interstate shipment in the proceedings mentioned, from Rutherfordton in the State of North Carolina to Scottville in the State of Tennessee, a valid exercise of State power; Inasmuch as the State statute referred to is, as applied to the shipment in question, a regulation of interstate commerce which is solely within the power of Congress under Article I, section 8, clause 3 of the Constitution of the United States, the benefit and protection of which Southern Railway Company duly and specially set up and claimed in these proceedings.

2. Said Court erred in holding that the state statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce forbidden to the states by being conferred exclusively on Congress by Article 1, Section 8, Clause 3, of the Constitution of the United States, the benefit and protection of which said clause of the Constitution the Southern Railway Company duly and specially set up and claimed in these proceedings.

3. Said Court erred in holding that the State statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce beyond the power of the State to make, inasmuch as Congress in the act to regulate Interstate Commerce had already acted and had thus assumed jurisdiction over the entire subject matter of this action, the benefit and protection of which act of Congress the defendant, Southern Railway Company, duly and specially set up and claimed in these proceedings.

4. Said Court erred in denying to the plaintiff-in-error, Southern Railway Company, the right, privilege or immunity of being governed, in respect to said shipment, solely by the Constitution of the United States and the Interstate Commerce Act of Congress, and in adjudging said plaintiff-in-error, in respect to receiving and forwarding said shipment, to be subject to the state statute referred to herein, and in thus denying to Southern Railway Company the right, privilege or immunity aforesaid, which it duly and specially set up and claimed in these proceedings.

5. Said Court erred in holding that Section 2631 of the North Carolina Revisal of 1905 is not unconstitutional and void, as being in violation of Section 1, of Article 14, of the Amendments to the Constitution of the United States, in that it is an arbitrary and unreasonable regulation of common carriers in the conduct of their business, and thus deprives them of their property without due process of law.

6. Said Court, for the various reasons above given, erred in rendering the final judgment it did render against the plaintiff-in-error, and which is complained of in this case.

Wherefore for these and other manifest errors appearing in the record, the said Southern Railway Company, plaintiff-in-error, prays that the judgment of the said Supreme Court of North Carolina be reversed, set aside and held for naught, and that judgment be rendered for plaintiff-in-error, granting it its rights under the Constitu-

tion and statutes of the United States, and plaintiff-in-error also prays for judgment for its costs.

ALFRED P. THOM,
W. B. RODMAN,
Per J.,
Attorneys for Southern Railway Company.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between C. C. Reid and Edward Beam, Co-partners, under the firm name of Reid and Beam and The Southern Railway Company, a corporation, wherein was drawn in question the validity of a reaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said The Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Su-
7 preme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixteenth day of June, in the year of our Lord, one thousand nine hundred and nine.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

H. L. GRANT,
Clerk Circuit Court United States,
Eastern District of North Carolina.

Allowed:
WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

8 Original.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to C. C. Reid and Edward Beam, co-partners under the firm name of Reid & Beam, Greeting:

You and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of North Carolina, wherein Southern Railway Company, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of North Carolina, this 16 day of June, 1909.

[SEAL.] WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

[Seal of the Supreme Court of the State of North Carolina.]

Attest:
THOS. S. KENAN,
Clerk Supreme Court of North Carolina,
Per J. L. SEAWELL, *Dep. Clk.*

Received June 21, 1909.
Served June 21, 1909.
By reading the within citation and delivering a copy thereof to each of the within named defendants C. C. Reid and Edward Beam, copartners under the firm name of Reid & Beam.

C. E. TANNER,
Sheriff Rutherford County.

Fees, .60. Due Southern Railway Co.

9 The Supreme Court of North Carolina.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error.
v.
REID & BEAM, Defendants in Error.

Bond.

Know all men by these presents, that we, Southern Railway Company, a corporation of the State of Virginia, the principal office of which is in the city of Richmond, in said State, as principal, and

The United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto

C. C. Reid and Edward Beam, copartners under the firm name of Reid & Beam, in the full and just sum of five hundred dollars ($500.00), for the payment of which sum, well and truly to be made, we hereby jointly and severally bind ourselves, and each of our successors, firmly by these presents.

Sealed with our seals, and dated this 15th day of June, in the year 1909:

Whereas lately at a hearing had before the Supreme Court of North Carolina, in a suit depending in said Court between the said C. C. Reid and Edward Beam, copartners under the firm name of Reid & Beam, as plaintiffs, and said Southern Railway Company, as defendant, a final judgment was rendered against the said Southern Railway Company, and Southern Railway Company seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment.

Now therefore, the condition of this obligation is such that if the said Southern Railway Company, as plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs and dam-
10 ages that may be adjudged against it if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SOUTHERN RAILWAY COMPANY,
By FAIRFAX HARRISON, *Vice President.*
THE UNITED STATES FIDELITY & GUARANTY CO.,
By WM. B. JONES, *Gen'l Agent.*

Attest:

[L. S.] GEO. R. ANDERSON,
Assist. Secretary.

Bond approved, and to operate as a supersedeas.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

11 REID & BEAM
against
SOUTHERN RAILWAY COMPANY.

Be it remembered that on the 10th day of September, 1906, the plaintiffs, C. C. Reid and Ed. Beam, trading and doing business under the firm name and style of Reid & Beam, sued out and had issued by the Clerk of the Superior Court of Rutherford County a summons in the following words:

Summons for Relief.

RUTHERFORD COUNTY:

In the Superior Court.

C. C. REID and ED. BEAM, Trading and Doing Business Under the Firm Name and Style of Reid & Beam,
against
SOUTHERN RAILWAY COMPANY.

State of North Carolina to the Sheriff of Rutherford County, Greeting:

You are hereby commanded to summon Southern Railway Company, the defendant above named, if it be found within your county, to be and appear before the Judge of our Superior Court at a court to be held for the county of Rutherford, at the court-house in Rutherfordton, N. C., on the fourth Monday after the first Monday of October, 1906, it being the 29th day of October, 1906, and
12 answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of said term; and let the said defendant take notice that if it fail to answer said complaint within the time required by law, the plaintiffs will apply to the Court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said Court, this 10th day of September, 1906.

(Signed) M. O. DICKERSON,
Clerk Superior Court,
Per C. P. TANNER, *D. C. S. C.*

Prosecution Bond.

We acknowledge ourselves bound unto Southern Railway Company, the defendant in this action, in the sum of two hundred dollars, to be void, however, if the plaintiff Reid & Beam shall pay to the defendant all such costs as the defendant may recover of the plaintiffs in such action.

Witness our hand and seal this 10th day of September, 1906.

(Signed) REID & BEAM. [SEAL.]
(Signed) O. T. WALDROP. [SEAL.]

Complaint.

NORTH CAROLINA,
Rutherford County:

In the Superior Court, February Term, 1907.

(Title of Cause.)

The plaintiffs above named, complaining of the defendant above named, aver and allege:

I. That the plaintiff is a copartnership composed of C. C. Reid and Ed. Beam, and are trading and doing business under the style and name of "Reid & Beam," and were at and prior to the times hereinafter mentioned engaged in the mercantile and lumber and shingle business.

13 II. That the defendant is a corporation doing business under the laws of North Carolina and elsewhere as a common carrier for hire of freight to and from its stations or depots in the State of North Carolina and elsewhere.

III. That the plaintiffs on July 2d, 1906, in the proper and ordinary way, loaded a box car on the siding of the defendant railway at Rutherfordton, N. C., with shingles and tendered the same to the defendant's regular agent at Rutherfordton, N. C., on the said date for shipment to one James Haddox, at Scottsville, Tenn.

IV. That the said car was left by the defendant company on the said siding of the defendant at Rutherfordton, N. C., to be used by the plaintiff for the shipping of shingles, and that the same were carefully loaded in the ordinary and usual manner, and was properly tendered by the plaintiffs to the defendant's agent at said station on the said 2d day of July, 1906, and that the said agent of the defendant railway refused to accept same for shipment and offered no excuse for said refusal except "that he did not know the correct amount of freight charges between Rutherfordton, N. C., and Scottsville, Tenn.

V. That Rutherfordton, N. C., is a regular station or depot on a line of railway of the defendant railway company, and that said siding or side-track is in regular use by the defendant company, and that the said station of Scottsville, Tenn., is on a line of railway of the defendant in this action in the State of Tennessee.

VI. That the defendant failed and refused to receive the said car-load of shingles on the 2d, 3d, 4th, 5th, 6th, 7th, 9th, 10th, 11th, 12th, 13th, 14th, 16th, 17th and 18th of July, 1906, without any valid reason for so doing, the 8th and 15th days being Sundays.

VII. That the said Haddox as plaintiff is informed and believes, obtained from an agent of the defendant the correct freight charges for the said car-load of shingles, and that the plaintiff

14 tendered said amount to the regular agent of the defendant at Rutherfordton, N. C., on several occasions during the time the said car was standing on the siding of the defendant company, and that at each time they offered to pay an additional amount

which the said agent might demand as the proper freight charges on the said shipment, and on the said 2d day of July, 1906, and at divers and numerous other times offered to prepay the said freight in advance on the said shingles, and requested the said agent of the defendant to ship same at said times, which the said agent failed and refused to do.

VIII. That, as plaintiff is informed and believes, they are entitled to recover the sum of $50 per day for each and every day the defendant failed and refused to receive the said carload of shingles, to-wit, fifteen days, aggregating the sum of $750.

Wherefore, the plaintiff prays judgment against the defendant in the sum of seven hundred and fifty dollars ($750) and the cost of this action.

(Signed) EDWARDS & ELLIOT,
Attorneys for Plaintiff.

C. C. Reid, one of the plaintiffs above named, being duly sworn, says that he is a member of the firm of Reid & Beam, plaintiffs in the above entitled action, and that the above complaint is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters so stated on information and belief he believes it true.

(Signed) C. C. REID.

Sworn to and subscribed before me this the 4th day of February, 1907.

(Signed) C. P. TANNER, *D. C. S. C.*

15 *Answer.*

NORTH CAROLINA,
Rutherford County:

In the Superior Court, February Term, 1907.

(Title of Cause.)

The defendant above named, answering the complaint in this cause, says:

1. That the allegations contained in the first paragraph thereof are true.

2. That the allegations contained in the second paragraph thereof are true.

3. Answering the allegations set out in section 3 of the complaint, defendant says that it admits that on July 2, 1906, the plaintiffs loaded with shingles a box car which was on a siding of the defendant railway company at Rutherfordton, N. C., and that on said date the plaintiffs requested defendant's agent at Rutherfordton to issue bill of lading for said carload of shingles, billing same from Rutherfordton, N. C., to one James Haddox at Scottsville, Tenn.

The other matters contained in said section are denied, and it is denied that there is any such place as Scottsville, Tenn.

4. Answering the allegations set out in section 4 of complaint, defendant admits that on or about July 2, 1906, the defendant company at the request of the plaintiffs placed an empty car on a siding for plaintiffs to load with shingles, and it is admitted that the said car was loaded in the usual manner. It is further admitted that on or about July 2, 1906, plaintiffs requested the defendant's agent to give the plaintiffs bill of lading for said carload of shingles, billing same from Rutherfordton, N. C., to Scottsville, Tenn., and it is further admitted that the said agent declined to issue bill of lading for said carload of shingles from Rutherfordton, N. C., to Scottsville, Tenn. The other matters contained in section 4 of the complaint are denied.

16 5. That as this defendant is informed and believes, the allegations contained in the fifth paragraph thereof are not true and are denied.

6. That as this defendant is informed and believes, the allegations contained in the sixth paragraph thereof are not true and are denied.

7. That as this defendant is informed and believes, the allegations contained in the seventh paragraph thereof are not true and are denied.

8. That as this defendant is informed and believes, the allegations contained in the eighth paragraph thereof are not true and are denied.

9. And for a further answer and defence to said action, this defendant says that this carload of shingles was to be shipped from North Carolina to Tennessee, and that the Statute of North Carolina, imposing a penalty for failure to ship the same, is null and void, being repugnant to the Interstate Commerce Clause of the Constitution of the United States, and also in conflict with the Interstate Commerce Act and laws regulating interstate commerce as passed by the Congress of the United States.

10. And for a further answer and defence to said action, this defendant says that the Statute of North Carolina, under which the plaintiff seeks to impose a penalty upon the defendant in this cause, is null and void, being an attempt to take the property of defendant without due process of law, and is in violation of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, having fully answered, defendant demands that it go without day and recover its costs.

(Signed) W. B. RODMAN,
R. S. EAVES,
G. F. BASON,
Attorneys for Defendant.

17 NORTH CAROLINA,
Gaston County:

I. P. Caldwell, being duly sworn, says that he is the agent of the defendant Southern Railway Co. at Gastonia, N. C.; that he has heard the foregoing answer read and knows the contents thereof;

that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

(Signed) I. P. CALDWELL.

Sworn to and subscribed before me this the 28th day of February, 1907.

(Signed) E. G. McCLURD,
[N. P. SEAL.] *Notary Public.*

Case on Appeal.

STATE OF NORTH CAROLINA,
County of Rutherford:

In the Superior Court.

(Title of Cause.)

This was an action to recover penalties amounting to seven hundred and fifty dollars under section 2631 of the Revisal of 1905, tried at the January Special Term, 1909, of the Superior Court for Rutherford County, before his Honor M. H. Justice, Judge presiding at said court, and a jury.

C. C. REID, witness for plaintiff, testified:

"My name is C. C. Reid; am one of the plaintiffs and a member of the firm of Reid & Beam. On or about June 25, 1906, we received an order from James Haddox for a carload of shingles, and I requested Mr. Gunnells, the agent of defendant, to place a car on the side-track on July 2d, and we loaded it July 2nd, 1906. I at once went to the agent at Rutherfordton and gave him shipping instructions and asked him for a bill of lading. He refused to give me a bill of lading and said he did not know the amount of freight. I offered to pay the freight either by cashier's check sent by
18 Haddocks or the cash, and he said he did not know where the station was, and he said he did not propose to lose anything for the railway company or himself on our account, and refused to issue a bill of lading. I told him that I wanted the car shipped and that I would pay the freight and give him bond for any additional amount he might find due. He refused to ship. I told him when he got ready to ship to phone me and I would come over and pay the freight. On the 17th of July a new agent came. His name was Castle, and he came over and told me he had come to take charge of the depot and had found a car of shingles of Reid & Beam not shipped, and asked me what the trouble was. I said I had loaded it and offered to prepay the freight and had given shipping instructions. He asked me to give him shipping instructions and he would ship it. I gave him shipping instructions the same I had given to Gunnels. I gave instructions to ship to James Haddox at Scottsville, Tennessee. I told him it was on the K. & A. I told him I thought

it was 10 or 8 miles out from Knoxville. On the 19th of July I paid the freight and he gave me a bill of lading. I do not know that I talked with Gunnels after July 2d. The car was shipped on the 19th. I got paid for the car of shingles. Gunnels still had charge of the depot at the time of shipment. He left about that time and Castles then took charge."

Cross-examined:

"I live at Rutherfordton, N. C. Ed. Beam and myself compose the firm of Reid & Beam at Rutherfordton, N. C. On June 25th, 1906, we had agreed to sell to James Haddocks a carload of shingles to be loaded at Rutherfordton, N. C., after they were traded to James Haddocks in the State of Tennessee, and were to be shipped to James Haddox in Tennessee. In order to comply with the order we asked the agent at Rutherfordton, N. C., to place a car upon the side-track at Rutherfordton, N. C., that we might load with shingles. He placed the car on July 2d, 1906. The car was placed on a
19 siding at Rutherfordton, N. C. After the car was placed I loaded it with shingles which we had contracted to sell to James Haddocks in the State of Tennessee. After it was loaded, and on the same day, I went to the agent of defendant at Rutherfordton and gave him shipping instructions, and told him to ship the car of shingles to James Haddocks at Scottsville, Tenn. I asked him for a bill of lading, and he said he did not know where Scottsville, Tenn., was. I do not know of my own personal knowledge where Scottsville, Tenn., is or that there is such a place. So far as I know there is no such place as Scottsville, Tenn. I tendered him a certified check for what Haddocks said would be the freight. He told me he did not know what the freight was, and I told him if that check was not enough I would give him the balance in cash or give him a bond to make him safe, and he said he did not propose to lose anything, and I told him when he got ready to ship to let me know. He told me that as soon as he got instructions he would give me a bill of lading. I supposed he would apply to some one to get instructions. I was then dissatisfied because I wanted the shingles shipped. I never lost one cent. Haddocks was a dairy man and ordered a carload of shingles, and I never tried to do any further business with him and never lost one cent by the delay."

Redirect:

"I told Gunnels if he did not want the check I would get the money and pay him."

Plaintiffs rest.

Defendant introduced certified copy of the charter of the Knoxville & Augusta Railroad Company.

W. P. HOOD, witness for defendant, testified:

"I live at Marysville, Tenn. Am engaged as Superintendent of the Knoxville & Augusta Railroad Company. There is no such place on the Knoxville & Augusta Railroad as Scottsville, Tennessee. There was no such place on my road in 1906. There was a siding on my road known as Scottville that was put in about 1901 for the accommodation of the J. F. Scott Brick Co. to handle the output of that business, which was brick manufacturing. It was a flag stop. There was no agent or depot there. No railroad business was transacted at that place prior to that time except the brick business of the concern located there. Business going to this place was way-billed from Knoxville, that is the business conducted on this industrial siding, which was such as we have around the city and where cars are placed for customers."

Cross-examined:

"There is a place on our road known as Scottville, but no Scottsville. There is a railroad known as the K. & A. It is an abbreviation of Knoxville & Augusta. It is operated as an independent line. I make remittances to H. G. Ainsley, who is also treasurer of the Southern Railway, and make reports to Mr. Laughton, who is also auditor of the Southern Railway. I have been superintendent for 21 years. My father, who was president of the K. & A. R. R., appointed me agent and afterwards I was appointed superintendent. Since the consolidation of the East Tennessee & Virginia R. R. with the Richmond & Danville R. R., the Southern Railway Co. pays all the employees their salaries. There is an industrial siding known as Scottville. It is a flag stop eight miles from Knoxville and two miles from Rockford. The way-bills for and from Scottville are made out at Rockford, a regular station. We have a siding for the accommodation of the brickyard, and up to the shipment of the car of shingles from Reid & Beam to James Haddocks had never received any shipment for that place. I remember this particular shipment. There was no difficulty in getting it to its destination from Knoxville, and it was delivered on the siding at Scottville. Before Laughton was auditor I reported to the former auditor of the Southern Railway Co. My vouchers were signed by Mr. Ainsley as treasurer of the K. & A. R. R."

P. B. GUNNELS, witness for defendant, testified:

"Was agent of the defendant at Rutherfordton in July, 1906. Mr. Reid tendered me a carload of shingles for Haddocks, Scottsville, Tenn., and asked me for a bill of lading. I told him I could not locate such a place as Scottsville, Tenn. I did not know the rate; that I would have to wire Mr. Cardwell, division freight agent, for a rate, and I told him I would give him a bill of lading as soon as I received a rate from the division freight agent. Reid did not tell me where Scottsville was. I did not ask him. I wired division freight agent and I received a reply from him saying he did not know of such a place and could not locate it."

Cross-examined:

"Mr. Reid did not tell me Scottsville was near Knoxville on the K. & A. R. R. The division freight agent told me and I notified Reid that he could not find such a place. I left Rutherfordton on July 28th, 1906. Reid did not tell me where the car was to go. I am still in the employ of the Southern Railway at Batesburg, S. C."

L. A. ZEALY, witness for defendant, testified:

"I live at Columbia, S. C., and am engaged as rate clerk for the Southern Railway in the office of D. Cardwell, division freight agent. I received a telegram from Gunnels asking rate on carload of shingles from Rutherfordton, N. C., to Scottsville, Tenn., and referred to the Railway Guide and failed to find Scottsville, Tenn. I then referred to Bullinger's Guide and failed to find the place in that book. The Railway Guide gives the names of all stations on all of the railroads in the United States, and Bullinger's Guide gives
the names of all railroad stations and nearest railroad sta-
22 tions to postoffices where there are no railroads in the United
States. They are standard books and are used by all railroads. His wire was received on July 9th, 1906. I wired back to Gunnels that I could not locate such a point. On July 14th I took it up with general freight office at Atlanta, Ga., and on the 18th learned where it was. I received a telegram from H. L. Miller, General Freight Agent at Knoxville, Tenn. He wired where it was, and I then telegraphed rate on July 19th."

Cross-examined:

"My recollection is that it was on July 9th I received telegram from Gunnels. We had no through published rates from Rutherfordton to any point on the Knoxville & Augusta R. R. I found Scottsville and Scottville outside of Tennessee."

R. J. CASTLE, witness for defendant, testified:

"I came here to relieve Gunnels in July, 1906. On July 18th Mr. Reid showed me some correspondence saying Scottsville was on K. & A. R. R. I wired Cardwell, division freight agent, about it, and he replied, and we billed the car out on the 19th."

Defendant closed.

C. C. REID, witness for plaintiffs, testified:

"I showed this letter to Gunnels on July 2d. I gave him the letter open and he looked at it. I cannot say he read it, but he had it open before him and looked at it."

Plaintiff closed.

Requests for Instructions.

In apt time the defendant requested the Court to charge the jury as follows:

I. If the jury find from the evidence that the plaintiffs in June, 1906, ordered a car to be placed on the siding at Rutherford-
23 ton, in the State of North Carolina, and that in consequence of such order a car was placed by the defendant company at the siding in Rutherfordton, N. C., and that the car was loaded by plaintiff with shingles, which plaintiffs had agreed to ship to James Haddocks at Scottsville or Scottville, Tennessee, and that after said car was loaded with said shingles plaintiffs went to the agent of defendant company at Rutherfordton, in the State of North Carolina, and asked him for a bill of lading for the shipment of the car of shingles to James Haddocks at Scottsville, in the State of Tennessee, and the agent of the defendant company at Rutherfordton declined to receive said car, stating that he did not know where Scottsville, Tennessee, was and did not know what the freight rate was and that plaintiffs offered to pay the freight or secure the same, then the statute, section 2631 of the Revisal would not apply, for that the ordering of the car for the purpose of shipping the shingles, the placing of the car, the loading of the shingles and tender of the same to the defendant company for shipment from Rutherfordton in the State of North Carolina to Scottsville in the State of Tennessee constituted and was interstate commerce and the laws of the State of North Carolina, Section 2631, of the Revisal of 1905, in so far as it undertakes to regulate, when, how and in what manner and under what terms, freight shall be received in North Carolina to be carried to the State of Tennessee, is a regulation of interstate commerce in violation of the Constitution of the United States, Article 1, Section 8, clause 3, giving to Congress the power and authority to regulate commerce among the States and the defendant having in its answer, and now setting up that it claims the benefit and protection of the Constitution of the United States and that the statute, to-wit: Section 2631 of the Revisal of 1905 is in conflict therewith, and therefore you will answer the first issue No.

II. In this case, the undisputed evidence is that the plaintiffs had sold or agreed to sell to James Haddocks, of Scottsville, Ten-
24 nessee, a carload of shi-gles, and that the carload of shingles was to be shipped from Rutherfordton, North Carolina, to Scottsville, in the State of Tennessee, that the plaintiffs in order to make the shipment requested or ordered defendant company to place an empty car on its siding at Rutherfordton, in the State of North Carolina, that in obedience to said order or request defendant company did place an empty car on its siding at Rutherfordton in the State of North Carolina, and plaintiffs loaded same with shingles which they had sold, or agreed to sell to James Haddocks, that on July 2, 1906, plaintiffs asked the agent of defendant company for a bill of lading for said shingles, consigning the same to James Haddocks, at Scottsville, in the State of Tennessee, and offered to pre-

pay the freight, that the agent refused and declined to issue the bill of lading, for that he did not know where Scottsville, Tennessee, was and did not know the freight rate, the Court charges you that the act of receiving a shipment of freight to go from the State of North Carolina to the State of Tennessee is an act of interstate commerce, and that under the Constitution of the United States Article I, Section 8, Clause 3, the power to regulate commerce between the States is vested solely in the Congress of the United States, that the power is not confined to the regulation of goods while in transit only, but extends to every phase of the transaction, including the sale and terms of sale between the parties, the ordering of the car for the purpose of making the shipment, the placing of the car, the loading of the car, the delivery or tender of the carload of shingles by plaintiffs to the defendant, and the terms of their receipt, and the entire transaction in all of its phases; that the action being brought under Section 2631 of the Revisal of 1905, and defendant having pleaded the invalidity of said statute as applying to interstate commerce, and now especially setting up and claiming the benefit and protection of the Constitution of the United States, and that the said statute is in conflict therewith and void, you will answer the issue No.

25 III. It is admitted that the subject matter of this action is to recover for failure to receive a shipment of freight at Rutherfordton in the State of North Carolina to be carried to Scottsville in the State of Tennessee, the defendant now especially setting up and claiming the benefit and protection of the Constitution of the United States and the amendments thereto requests the Court to hold and charge the jury:

1st. That the statute in question is, in so far as it undertakes to regulate the receipt of goods for shipment to another State, in violation *to* Article I, Section 8, Clause 3 of the Constitution of the United States.

2d. That the shipment in question being destined to Scottville in the State of Tennessee was interstate commerce, and the statute in question, in so far as it undertakes to regulate, when or under what circumstances, freight should be received for shipment from one State to another is a regulation of interstate commerce and the statute is in conflict with the Constitution of the United States and void.

3d. That the statute in question is in violation of the 14th amendment to the Constitution of the United States in that

(*A*) It is an arbitrary and unreasonable regulation of defendant in the conduct of its business, in that it undertakes to impose a penalty upon defendant for failure to at once receive for shipment all freight tendered it, without making any exception for any cause whatsoever such as a visitation of God, act of the public enemy, or of matters beyond the power of defendant to prevent, and thus deprives the defendant of its property without due process of law and denies to it the equal protection of the law, the defendant now especially setting up and claiming the benefit and protection of the Constitution of the United States and the amendments thereto prays

the Court to charge the jury to answer the issue No, for that said statute is void.

IV. Under the law, and this statute, the defendant company is not required to receive shipment of freight for points beyond its own line unless it has established a custom of receiving freight
26 for that point to which freight is destined, or unless it ordinarily receives freight for that point, therefore if the jury find from the evidence that the defendant had no established freight rate from Rutherfordton in the State of North Carolina, to Scottsville or Scottville, in the State of Tennessee, and that -he defendant company was not in the custom of or ordinarily received freight consigned to or destined for Scottsville or Scottville, you will answer the issue No.

V. A common carrier can only be required to receive freight for carriage to those points which have been established for the delivery of freight, or to which it is usually or habitually or frequently carried for delivery to the public; a common carrier cannot be required to receive and issue bills of lading for every shipment of freight destined to points which have not been established for the delivery of freight to the public, nor can a common carrier be required to receive freight and issue a bill of lading therefor to industrial sidings in another State, and not on its own line, unless it has habitually or usually or frequently been in the habit of receiving freight consigned to such a place, therefore, if the jury find from the evidence that at the time this shipment was offered defendant company, there was no such place as Scottsville in the State of Tennessee, but that there was a place called Scottville, which was located in the State of Tennessee, on the Knoxville and Augusta Railroad, that this place Scottville was only an industrial siding which had been put in by the Knoxville and Augusta Railroad Company to accommodate a brick yard, which was located at that place, and that at the time this shipment was tendered the defendant no freight had been received by the defendant company to that point, that the Knoxville and Augusta Railroad Company billed all freight which it intended to deliver to the siding to Rockford, a regular station two miles away, and that the way-bills for all shipments going from Scottville were made out at Rockford and that no agent was maintained at this point, that it did not appear among the list of station- in any of the standard works giving such list,
27 as they have been offered in evidence, then the Court charges you that you would answer the issue No, for that: 1st. The place Scottville would not be such a station as defendant company would be required to receive freight for and issue bill of lading. 2d. For that the statute in question if it be held to apply to such a state of facts would be such an arbitrary and unreasonable regulation of defendant's business as would deprive the defendant of its property without due process of law and deny to the defendant the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States, the benefit and protection of which this defendant now especially sets up and claims. 3d. For that it would be unreasonable and burdensome regulation of inter-

state commerce between the States in conflict with Article I, Section 8, Clause 3, of the Constitution of the United States, the benefit and protection of which defendant now especially sets up and claims.

VI. Upon all the evidence the jury will answer the first issue No.

VII. If the jury find from the evidence that Scottville, Tennessee, was not a place which the defendant company was in the habit, or frequently, or usually received freight for delivery to the public generally, you will answer the issue No.

VIII. The burden is on the plaintiff to show to the satisfaction of the jury that the defendant company was in the habit of, or frequently, or usually received freight destined for Scottville, Tenn., and issued bills of lading therefor, and that it was a station, or place at which freight was usually delivered to the public, and if they have failed to so satisfy you by the greater weight of evidence you will answer the issue No.

IX. The defendant company was not required to issue a bill of lading for goods destined to points not on its own line and you will answer the first issue No.

28 X. If the jury find from the evidence that on July 2d, 1906, plaintiffs tendered the carload of shingles to defendant's agent at Rutherfordton and demanded a prepaid bill of lading be issued therefor consigning said shipment to James Haddocks, at Scottsville, Tenn., and that defendant's agent replied that he did not know where Scottsville, Tenn., was and did not know what the freight rate was, and that the agent wired his superior officer having charge of such matter for the rate, and that the superior officer undertook to locate Scottsville, Tenn., but could not do so until July 11th, 1906, when the place was located and found to be Scottville, Tenn., an industrial siding on the line of the Knoxville & Augusta Railroad, which had been established as a siding to accommodate a brickyard, and that all freight from that point was billed from Rockford, a regular station two miles away, and that the defendant company had made no rate from Rutherfordton to Scottville, Tenn., and had not been in the habit or custom of receiving and billing freight to that point, you would answer the issue No.

XI. Repeat the prayer just above mentioned and add thereto: "For that the statute in question, as applied to those facts, if the jury from the evidence find them to be facts would be such an arbitrary and unreasonable regulation of the business of defendant, as would deprive it of its property without due process of law and deny to it the equal protection of the law, in violation of the Constitution of the United States and the 14th Amendment thereto, and further would be an unreasonable and burdensome regulation of interstate commerce and in conflict with Article I, Section 8, Clause 3, of the Constitution, the benefit and protection of which defendant sets up and claims.

XII. There was no such tender as contemplated by the statute on any day except July 2d, 1906, and under no circumstances can you answer the issue for more than fifty dollars.

29 The Court refused to give defendant's request for instructions numbered I and to this refusal of the Court the defendant in apt time excepted.

Exception No. 1.

The Court refused to give defendant's request for instructions numbered II and to this refusal of the Court the defendant in apt time excepted.

Exception No. 2.

The Court refused to give defendant's request for instructions numbered III (1st), and to this refusal of the Court defendant in apt time excepted.

Exception No. 3.

The Court refused to give defendant's request for instructions numbered III (2d), and to this refusal of the Court defendant in apt time excepted.

Exception No. 4.

The Court refused to give defendant's request for instructions numbered III (3d A), and to this refusal of the Court defendant in apt time excepted.

Exception No. 5.

The Court refused to give defendant's request for instructions numbered IV and to this refusal of the Court defendant in apt time excepted.

Exception No. 6.

The Court refused to give defendant's request for instructions numbered V and to this refusal of the Court defendant in apt time excepted.

Exception No. 7.

30 The Court refused to give defendant's request for instructions numbered V (2d), and to this refusal of the Court defendant in apt time excepted.

Exception No. 8.

The Court refused to give defendant's request for instructions numbered V (3d), and to this refusal of the Court defendant in apt time excepted.

Exception No. 9.

The Court refused to give defendant's request for instructions numbered VI and to this refusal of the Court defendant in apt time excepted.

Exception No. 10.

The Court refused to give defendant's request for instructions numbered VII and to this refusal of the Court defendant in apt time excepted.

Exception No. 11.

The Court refused to give defendant's request for instructions numbered VIII, and to this refusal of the Court defendant in apt time excepted.

Exception No. 12.

The Court refused to give defendant's request for instructions numbered IX and to this refusal of the Court defendant in apt time excepted.

Exception No. 13.

The Court refused to give defendant's request for instructions numbered X and to this refusal of the Court defendant in apt time excepted.

Exception No. 14.

31 The Court refused to give defendant's request for instructions numbered XI and to this refusal of the Court defendant in apt time excepted.

Exception No. 15.

The Court refused to give defendant's request for instructions numbered XII and to this refusal of the Court defendant in apt time excepted.

Exception No. 16.

The Court charged the jury as follows: "The burden is on the plaintiffs to show by the greater weight of the evidence that the defendant is indebted to plaintiffs. This suit is brought to recover penalty for a refusal on the part of the defendant, Southern Railway Company, to receive a carload of shingles for shipment to James Haddocks, Scottsville, Tenn. In order to entitle plaintiffs to recover it is necessary for the jury to find from the evidence, by the greater weight thereof, first that the defendant is a common carrier—that is admitted—second, that the plaintiffs tendered the carload of shingles for shipment, and third, that defendant refused to receive the same for shipment. If the jury finds from the evidence, by the greater weight thereof, first that the plaintiffs, Reid & Beam, tendered the carload of shingles to Gunnels, the defendant's agent at Rutherfordton, and furnished him with shipping directions and offered to prepay the freight and demanded a bill of lading and that the plaintiffs demanded that the car be shipped then the plaintiffs would be entitled to recover unless you find from the evidence that the defendant failed and refused to ship by reason of facts intervening which defendant, by the exercise of reasonable care, could not have prevented or overcome. The defendant contends that the agent did not know where Scottsville was and did not know the freight rate

and that therefore defendant is excused. If you find from the evidence by the greater weight thereof that Scottsville or Scott-
32 ville was a flag station on a branch road under control of defendant company, then it was the business of the agent of defendant company to know where it was and to know the freight rate to that point, or if you so find that the plaintiff told the agent that Scottsville was on a branch road running out from Knoxville and on the K. & A. Railroad and some 7 or 8 miles from Knoxville and that statement was true and further so find that by the exercise of reasonable care and diligence on the part of the agent he could have ascertained where the place was and the rates it was his duty to do so and failure on his part to exercise such reasonable care would not excuse the defendant company. If you find from the evidence by the greater weight thereof that defendant refused on July 2d to receive the car simply on the ground that the agent did not know and could not by the exercise of reasonable care have ascertained the locality and rates and you find from the evidence that he did know or by the exercise of reasonable diligence could have known the locality and the rates and if you further find from the evidence, by the greater weight thereof, that the failure to ship up to the 19th was on the same ground and no other then the plaintiffs would be entitled to recover $50 a day as a penalty for such failure from 14 days, this would exclude the day of shipment and also exclude the Sundays included between the dates, which would be $700."

The jury retired and answered the issue as follows:

Issue.

"Is the defendant indebted to the plaintiff for the unlawful failure to receive a carload of shingles to be transported to Scottsville, Tenn., as alleged, if so, in what sum?" Answer: Three hundred and fifty dollars."

There was a motion by defendant to set aside the verdict of the jury and for a new trial; motion was overruled; defendant excepted; there was judgment in accordance with the verdict and de-
33 fendant excepted and appealed to the Supreme Court; notice of appeal given in open court and appeal bond in the sum of forty dollars adjudged sufficient. Defendant is allowed thirty days to make out and tender case on appeal, plaintiffs to be allowed thirty days thereafter to except or serve counter case.

The defendant submits the following assignments of error:

First. The Court erred in refusing to give defendant's request for instructions numbered I, as follows:

"I. If the jury find from the evidence that the plaintiff, in June, 1906, ordered a car to be placed on the siding at Rutherfordton, in the State of North Carolina, and that in consequence of such order a car was placed by the defendant company at the siding in Rutherfordton, N. C., and that the car was loaded by plaintiff with shingles, which plaintiffs had agreed to ship to James Haddocks, at Scottsville or Scottville, Tennessee, and that after said car was loaded with said shingles plaintiffs went to the agent of defendant company at Rutherfordton, in the State of North Carolina, and asked him for a

bill of lading for the shipment of the car of shingles to James Haddocks, at Scottsville, in the State of Tennessee, and the agent of the defendant company at Rutherfordton declined to receive said car, stating that he did not know where Scottsville, Tennessee, was and did not know what the freight rate was and that plaintiffs offered to pay the freight or secure the same, then the statute, Section 2631 of the Revisal, would not apply, for that the ordering of the car, for the purpose of shipping the shingles, the placing of the car, the loading of the shingles and tender of the same to the defendant company for shipment from Rutherfordton, in the State of North Carolina, to Scottsville, in the State of Tennessee, constituted and was interstate commerce and the laws of the State of North Carolina, Section 2631 of the Revisal of 1905, in so far as it undertakes to regulate, when, how, and in what manner and under what terms, freight shall be received in North Carolina to be carried to the State of Tennessee, is a regulation of interstate commerce in viola-
34 tion of the Constitution of the United States, Article I, Section 8, Clause 3, giving to Congress the power and authority to regulate commerce among the states and the defendant having in its answer, and now setting up that it claims the benefit and protection of the Constitution of the United States and that the statute, to-wit: Section 2631 of the Revisal of 1905 is in conflict therewith, and therefore you will answer the first issue "No." Which constitutes defendant's Exception No. 1.

Second. The Court erred in refusing to give defendant's request for instructions numbered II, as follows:

"II. In this case, the undisputed evidence is that the plaintiff had sold or agreed to sell to James Haddocks, of Scottsville, Tennessee, a carload of shingles, and that the carload of shingles was to be shipped from Rutherfordton, North Carolina, to Scottsville, in the State of Tennessee, that the plaintiffs in order to make the shipment requested or ordered defendant company to place an empty car on its siding at Rutherfordton, in the State of North Carolina, that in obedience to said order or request defendant company did place an *an* empty car on its siding at Rutherfordton, in the State of North Carolina, and plaintiffs loaded same with shingles which they had sold, or agreed to sell to James Haddocks, that on July 2, 1906, plaintiffs asked the agent of defendant company for a bill of lading for said shingles, consigning the same to James Haddocks, at Scottsville, in the State of Tennessee, and offered to prepay the freight, that the agent refused and declined to issue the bill of lading, for that he did not know where Scottsville, Tennessee, was and did not know the freight rate, the Court charges you that the act of receiving a shipment of freight to go from the State of North Carolina to the State of Tennessee is an act of interstate commerce, and that under the Constitution of the United States, Article I, Section 8, Clause 3, the power to regulate commerce between the States is vested solely in the Congress of the United States, that the power is not confined to the regulation of goods while in transit only, but extends to every
35 phase of the transaction, including the sale and terms of sale between the parties, the ordering of the car for the purpose of

making the shipment, the placing of the car, the loading of the car, the delivery or tender of the carload of shingles by plaintiffs to defendant, and the terms of their receipt, and the entire transaction in all of its phases; that the action being brought under Section 2631 of the Revisal of 1905, and defendant having pleaded the invalidity of said statute as applying to interstate commerce, and now especially setting up and claiming the benefit and protection of the Constitution of the United States, and that the said statute is in conflict therewith and void, you will answer the issue No." Which constitutes defendant's Exception No. 2.

Third. The Court erred in refusing to give defendant's request for instructions numbered III (1st), as follows:

"III. It is admitted that the subject matter of this action is to recover for failure to receive a shipment of freight at Rutherfordton, in the State of North Carolina, to be carried to Scottsville, in the State of Tennessee, the defendant now especially setting up and claiming the benefit and protection of the Constitution of the United States and the amendments thereto, requests the Court to hold and charge the jury:

1st. That the statute in question is, in so far as it undertakes to regulate the receipt of goods for shipment to another State, in violation of Article I, Section 8, Clause 3 of the Constitution of the United States." Which constitutes defendant's Exception No. 3.

Fourth. The Court erred in refusing to give defendant's request for instruction numbered III (2d), as follows:

"2d. That the shipment in question being destined to Scottsville, in the State of Tennessee, was interstate commerce, and the statute in question, in so far as it undertakes to regulate, when or under what circumstances, freight should be received for shipment from one State to another is a regulation of interstate commerce and the statute is in conflict with the Constitution of the United States and void." Which constitutes defendant's Exception No. 4.

36 Fifth. The Court erred in refusing to give defendant's request for instructions numbered III (3dA), as follows:

"3d. That the statute in question is in violation of the 14th Amendment to the Constitution of the United States in that

(A) It is an arbitrary and unreasonable regulation of defendant in the conduct of its business, in that it undertakes to impose a penalty upon defendant for failure to at once receive for shipment all freight tendered it, without making any exception for any cause whatsoever such as a visitation of God, act of the public enemy, or of matters beyond the power of defendant to prevent, and thus deprives the defendant of its property without due process of law and denies *it to* the equal protection of the law, the defendant now especially setting up and claiming the benefit and protection of the Constitution of the United States and the amendments thereto, prays the Court to charge the jury to answer the issue No. for that said statute is void." Which constitutes defendant's Exception No. 5.

Sixth. The Court erred in refusing to give defendant's request for instructions numbered IV as follows:

"IV. Under the law, and this statute, the defendant company is

not required to receive shipment of freight for points beyond its own line unless it has established a custom of receiving freight for that point to which freight is destined, or unless it ordinarily receives freight for that point, therefore if the jury find from the evidence that the defendant had no established freight rate from Rutherfordton, in the State of North Carolina, to Scottsville or Scottville, in the State of Tennessee, and that the defendant company was not in the custom of or ordinarily received freight consigned to or destined for Scottsville or Scottville, you will answer the issue No." Which constitutes defendant's Exception No. 6.

Seventh. The Court erred in refusing to give defendant's request for instructions numbered V as follows:

"V. A common carrier can only be required to receive freight for carriage to those points which have been established for
37 the delivery of freight, or to which it is usually or habitually or frequently carried for delivery to the public; a common carrier cannot be required to receive and issue bills of lading for every shipment of freight destined to points which have not been established for the delivery of freight to the public, nor can a common carrier be required to receive freight and issue a bill of lading therefor to industrial sidings in another State, and not on its own line, unless it has habitually or usually or frequently been in the habit of receiving freight consigned to such a place, therefore, if the jury find from the evidence that at the time this shipment was offered defendant company, there was no such place as Scottsville, in the State of Tennessee, but that there was a place called Scottville, which was located in the State of Tennessee, on the Knoxville and Augusta Railroad, that this place Scottville was only an industrial siding which had been put in by the Knoxville and Augusta Railroad Company to accommodate a brick yard, which was located at that place, and that at the time this shipment was tendered the defendant no freight had been received by the defendant company to that point, that the Knoxville and Augusta Railroad Company billed all freight which it intended to deliver to the siding to Rockford, a regular station two miles away, and that the way-bills for all shipments going from Scottville were made out at Rockford, and that no agent was maintained at this point, that it did not appear among the list of stations in any of the standard works giving such list, as they have been offered in evidence, then the Court charges you that you would answer the issue No, for that: 1st. The place Scottville would not be such a station as defendant company would be required to receive freight for and issue bill of lading." Which constitutes defendant's Exception No. 7.

Eighth. The Court erred in refusing to give defendant's request for instructions numbered V (2d) as follows: "For that the statute in question if it be held to apply to such a state of facts would be such an arbitrary and unreasonable regulation of defendant's
38 business as would deprive the defendant of its property without due process of law and deny to the defendant the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States, the benefit and protection of which

this defendant now especially sets up and claims," which constitutes defendant's Exception No. 8.

Ninth. The Court erred in refusing to give defendant's request for instructions numbered V (3d) as follows: "For that it would be an unreasonable and burdensome regulation of interstate commerce between the States in conflict with Article I, Section 8, Clause 3 of the Constitution of the United States, the benefit and protection of which defendant now especially sets up and claims," which constitutes defendant's Exception No. 9.

Tenth. That the Court erred in refusing to give defendant's request for instructions numbered VI as follows: "Upon all the evidence the jury will answer the first issue No," which constitutes defendant's Exception No. 10.

Eleventh. That the Court erred in refusing to give defendant's request for instructions number VII as follows: "If the jury find from the evidence that Scottville, Tennessee, was not a place which the defendant company was in the habit, or frequently, or usually received freight for delivery to the public generally, you will answer the issue No," which constitutes defendant's Exception No. 11.

Twelfth. That the Court erred in refusing to give defendant's request for instructions numbered VIII as follows:

"VIII. The burden is on the plaintiff to show to the satisfaction of the jury that the defendant company was in the habit of, or frequently, or usually received freight destined for Scottville, Tenn., and issued bills of lading therefor, and that it was a station, or place at which freight was usually delivered to the public, and if they have failed to so satisfy you by the greater weight of the evidence you will answer the issue No." Which constitutes defendant's Exception No. 12.

Thirteenth. The Court erred in refusing to give defend-
39 ant's request for instructions numbered IX as follows: "The defendant company was not required to issue a bill of lading for goods destined to points not on its own line and you will answer the first issue No," which constitutes defendant's Exception No. 13.

Fourteenth. The Court erred in refusing to give defendant's request for instructions numbered X as follows:

"X. If the jury find from the evidence that on July 2d, 1906, plaintiffs tendered the carload of shingles to defendant's agent at Rutherfordton and demanded a prepaid bill of lading be issued therefor consigning said shipment to James Haddocks, at Scottsville, Tenn., and that defendant's agent replied that he did not know where Scottsville, Tenn., was and did not know what the freight rate was, and that the agent wired his superior officer having charge of such matter for the rate, and that the superior officer undertook to locate Scottsville, Tenn., but could not do so until July 11th, 1906, when the place was located and found to be Scottville, Tenn., an industrial siding on the line of the Knoxville & Augusta Railroad, which had been established as a siding to accommodate a brick yard, and that all freight from that point was billed from Rockford, a regular station two miles away, and that the defendant company had made no rate from Rutherfordton to Scottville, Tenn., and had not

been in the habit or custom of receiving and billing freight to that point, you would answer the issue No." Which constitutes defendant's Exception No. 14.

Fifteenth. The Court erred in refusing to give defendant's request for instructions numbered XI as follows:

"XI. Repeat the prayer just above mentioned and add thereto: 'For that the statute in question, as applied to those facts, if the jury, from the evidence find them to be facts, would be such an arbitrary and unreasonable regulation of the business of defendant, as would deprive it of its property without due process of law and deny to it the equal protection of the law, in violation of the Constitution of the United States and the 14th Amendment thereto, and
40 further would be an unreasonable and burdensome regulation of interstate commerce and in conflict with Article I, Section 8, Clause 3 of the Constitution, the benefit and protection of which defendant sets up and claims.'" Which constitutes defendant's Exception No. 15.

Sixteenth. The Court erred in refusing to give defendant's request for instructions numbered XII as follows: "There was no such tender as contemplated by the statute on any day except July 2d, 1906, and under no circumstances can you answer the issue for more than fifty dollars," which constitutes defendant's Exception No. 16.

Seventeenth. The Court erred in charging the jury as follows, to-wit: "If the jury finds from the evidence, by the greater weight thereof, first, that the plaintiffs, Reids & Beam, tendered the carload of shingles to Gunnels, the defendant's agent at Rutherfordton, and furnished him with shipping directions and offered to prepay the freight and demanded a bill of lading and that the plaintiffs demanded that the car be shipped, then the plaintiffs would be entitled to recover, unless you find from the evidence that the defendant failed and refused to ship by reason of facts intervening which defendants, by the exercise of reasonable care, could not have prevented or overcome."

Eighteenth. The Court erred in charging the jury as follows, to-wit: "If you find from the evidence, by the greater weight thereof, that defendant refused on July 2d to receive the car simply on the ground that the agent did not know and could not by the exercise of reasonable care have ascertained the locality and rates and you find from the evidence that he did know or by the exercise of reasonable diligence could have known the locality and the rates, and if you further find from the evidence, by the greater weight thereof, that the failure to ship up to the 19th was on the same ground and no other, then the plaintiffs would be entitled to recover $50 a day for such failure for 14 days, this would exclude the day of shipment and also exclude the Sunday included between the dates, which would be $700.00."

41 The foregoing, together with the complaint, answer and judgment, defendant tenders as the proper case on appeal in this cause. This 3d day of February, 1909.

(Signed) W. B. RODMAN AND
GALLERT & CARSON,
Attorneys for Defendant, Appellant.

The service of the foregoing case on appeal tendered by defendant is this day accepted and service by an officer is waived. This 12th day of February, 1909.

(Signed) M. L. EDWARDS AND
H. C. ELLIOTT,
Attorneys for Plaintiffs, Appellee.

Filed February 12, 1909.
(Signed) M. O. DICKERSON, *C. S. C.*

Judgment.

NORTH CAROLINA,
Rutherford County:

In the Superior Court, Special Term, 1909.

(Title of Cause.)

This cause coming on to be heard at the Special Term, January, 1909, of the Superior Court of Rutherford County before his Honor, M. H. Justice, Judge presiding and a jury, and being heard and the following issue having been submitted to the jury, to-wit: "Is the defendant indebted to the plaintiff for the unlawful failure to receive a carload of shingles to be transported to Scottsville, Tenn., if so what sum?" And having been answered by the jury, as follows, to-wit: "$350.00": It is therefore upon motion, ordered, adjudged and decreed by the Court that the plaintiff have and recover of the defendant the sum of $350.00 and the cost of this action.

(Signed) M. H. JUSTICE,
Judge Holding the Special Term of Superior Court, Rutherford County, 1909.

42 *Appeal Bond.*

STATE OF NORTH CAROLINA,
County of Rutherford:

In the Superior Court.

(Title of Cause.)

Whereas, at the Special January Term, 1909, of the Superior Court of Rutherford County, North Carolina, the plaintiffs above named recovered judgment against the defendant above named in the sum of $350.00 and for the costs of this action, and whereas the defendant above named intends to appeal from said judgment to the Supreme Court; now, therefore, we the Southern Railway Company, and the United States Fidelity and Guaranty Co., as surety, undertake, pursuant to the statute, that the said appellant shall pay all costs and damages that may be awarded against the said appellant,

Southern Railway Company on such appeal, not exceeding forty dollars.

This 9th day of April, 1909.

SOUTHERN RAILWAY COMPANY,
By S. GALLERT, *Attorney;*
THE U. S. FIDELITY & GUARANTY CO.,
By A. L. GRAYSON, *Agent.*

[Seal of the United States Fidelity & Guaranty Co., Incorporated, 1896.]

Clerk's Certificate.

STATE OF NORTH CAROLINA,
County of Rutherford:

I, M. O. Dickerson, Clerk of the Superior Court of Rutherford County, do hereby certify that the foregoing is a true and correct and perfect transcript of the record in the case of Reid & Beam v. Southern Railway Company, as appears by the papers in the case now on file in my office. Witness my hand and seal of office, this 17th day of April, 1909.

[SEAL.] M. O. DICKERSON,
Clerk of the Superior Court of Rutherford County.

(Docket entries: Appeal docketed April 21, 1909; case submitted on brief under Rule 12, May 5, 1909; opinion handed down May 25 as follows:)

43 REID AND BEAM
v.
SOUTHERN RAILWAY COMPANY.

Opinions.

This was a civil action, under Section 2361, Revisal 1905, for wrongful failure to receive freight for shipment, tried before his Honor Justice, J., at January Special Term, 1909, of the Superior Court of Rutherfordton County.

There was evidence, on the part of plaintiffs, tending to show that, on or about June 25, 1906, the plaintiff firm, having received an order for a car load of shingles, from one James Haddox at Scottsville, Tennessee, applied to P. B. Gunnels, who was then agent of defendant company at Rutherfordton, N. C., for a car; the same was furnished and loaded with the shingles by plaintiff on July 2nd, shipping instructions given, prepayment of freight tendered, and bill of lading demanded; that the agent of defendant refused to give bill of lading, or ship the goods, assigning for reason that he did not know where Scottsville, Tennessee, was, nor the rate thereto; plaintiffs demanded that the goods be shipped, and tol*f* the agent they would prepay any additional amount found to be due, and requested

that when the agent got ready to ship to phone to plaintiffs and they would come over and pay the freight due; that defendant's agent failed and refused to ship the shingles till July 17th, when one Castle came to take over the agency, and being told, on enquiry of plaintiffs, about the car load of shingles and what the trouble was, he asked for shipping instructions, which was given, to James Haddox, Scottsville, Tennessee, and on July 19th, the freight was paid, the bill of lading given, and shingles shipped as directed, arriving at their destination without further let or hindrance.

Plaintiffs further testified that they had received no pecuniary injury by reason of the delay; that Gunnels still had charge of the depot when the shingles were shipped, and that he left about that time, and Castle took charge.

There was evidence, on the part of defendant, that Scottville, Tennessee, was an industrial siding on the Knoxville & Augusta Road, eight or ten miles out of Knoxville, Tenn., established
44 for the convenience of persons shipping brick from that point; that there was no depot or regular agent there, but were re-billed to that point at Rockford, a regular station on the same road, some two miles distance.

One W. P. Hood, testifying for defendant, stated that he was Superintendent of the Knoxville & Augusta Road, and that this road was operated as an independent line: that there was no such place on that road as Scottsville, but an industrial siding called Scottville, at the point indicated, a flag station eight or ten miles out from Knoxville, and that bills of lading for goods to and from that point were made out at Rockford, a regular station some two miles distant. On cross-examination, the witness stated that his remittances from the operation of the road were made to the Treasurer of the defendant company; that his reports were made to the Auditor of such company, and that, since the consolidation of the East Tenn. & Va. Railroad with the old Richmond & Danville, the defendant company had paid all the employees of the K. and A. Road their salaries.

The Court below charged the jury, in part, as follows:

"The burden is on the plaintiffs to show, by the greater weight of the evidence, that the defendant is indebted to plaintiffs. This suit is brought to recover penalty for refusal on the part of the defendant, Southern Railway Company, to receive a carload of shingles for shipment to James Haddox, Scottville, Tenn. In order to entitle plaintiffs to recover it is necessary for the jury to find from the evidence, by the greater weight thereof, first that the defendant is a common carrier—that is admitted—second, that the plaintiffs tendered the carload of shingles for shipment, and third, that defendant refused to receive the same for shipment. If the jury finds from the evidence, by the greater weight thereof, first that the plaintiffs, Reid & Beam, tendered the carload of shingles to Gunnels, the defendant's agent at Rutherfordton, and furnished him with shipping directions and offered to prepay the freight and demanded a bill of lading, and that the plaintiffs demanded that the car be shipped, then the plaintiffs would be entitled to recover; unless you find from the evidence

that the defendant failed and refused to ship by reason of facts intervening which defendant, by the exercise of reasonable care, could not have prevented or overcome. The defendant contends that the agent did not know where Scottsville was, and did not know the freight rate, and that, therefore, defendant is excused. If you
45 find from the evidence, by the greater weight thereof, that Scottsville or Scottville was a flag station on a branch road under control of defendant company, then it was the business of the agent of defendant company to know where it was, and to know the freight rate to that point, or if you so find that the plaintiffs told the agent that Scottsville was on a branch road running out from Knoxville, and on the K. & A. Railroad and some 7 or 8 miles from Knoxville, and that statement was true, and further so find that by the exercise of reasonable care and diligence on the part of the agent he could have ascertained where the place was, and the rates, it was his duty to do so, and failure on his part to exercise such reasonable care would not excuse the defendant company. If you find from the evidence by the greater weight thereof, that defendant refused on July 2d to receive the car simply on the ground that the agent did not know and could not, by the exercise of reasonable care, have ascertained the locality and rates, and you further find from the evidence, by the greater weight thereof, that the failure to ship up to the 19th was on the same ground and no other, then the plaintiffs would be entitled to recover $50. a day as a penalty for such failure from 14 days, this would exclude the day of shipment and also exclude the Sundays included between the dates, which would be $700."

The jury rendered a verdict as follows:

"Is the defendant indebted to the plaintiffs for the unlawful failure to receive a carload of shingles to be transported to Scottsville, Tenn., as alleged, if so in what sum?

Answer: Three hundred and fifty dollars."

There was judgment on the verdict for plaintiffs, and defendant excepted and appealed; and, having made eighteen exceptions duly noted in the record, under different forms of st*a*tament, assigns for error:

"(1) That the Statute in question, Revisal 1905, sec. 2631, is unreasonable and oppressive, and in conflict with the 14th Amendment to the Federal Constitution.

(2) That, as applied to interstate commerce, the same is in conflict with Article 1, sec. 8, clause 3, of said Constitution:

(*a*) As an unlawful attempt to regulate commerce.

(*b*) And on the facts presented here as amounting to distinct burden upon it.

46 W. B. Rodman and James M. Carson for def'd't. No counsel contra.

HOKE, *J.*, after stating the case:

The validity of these penalty statutes have been before the Court for consideration in many recent cases, and in Efland v. Railroad,

146 N. C., 138, this being a decision on a statute of kindred nature, the Court, in speaking to the power of a government to enact regulations of this character, said:

"The right of the State to establish regulations for these public service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is now and has long been too firmly established to require or permit discussion." Citing: "Harrill's case, 144 N. C., 532; Stone's case, 144 N. C., 220; Walker's case, 137 N. C., 168; McGowan's case, 95 N. C., 417; Branch's case, 77 N. C., 347; Railway v. State of Florida, 203 U. S., 261; Railway v. Helms, 115 U. S., 513; Mobile v. Kimball, 102 U. S., 691; Munn v. Illinois, 94 U. S., 112."

The opinion then quotes from that of Associate Justice Fields, in Helm's case, 115 U. S., 513, both on the right to enact such statutes and the necessity for their proper enforcement, as follows:

"The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every State of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life, and property, and make that increase in many cases double, and in some cases treble, and even quadruple the actual damages." And proceeds further: "And the right to establish such regulations for certain classes of pursuits and occupations, imposing these requirements
47 equally on all members of a given class, has been made to rest largely in the discretion of the Legislature. Tullis v. Railway, 175 U. S., 348; Insurance Co. v. Daggs, 172 U. S., 562; McGowan v. Savings Bank, 170 U. S., 286."

And the very statute in question here, Revisal 1905, sec. 2631, has been approved and upheld in several of these cases as a just and reasonable exercise of the power indicated, and both as to inter and intrastate commerce. Garrison v. Railroad, present term; Twitty v. Ry., 141 N. C., 355; Currie v. Railroad, 135 N. C., 536; Baggs v. Railroad, 109 N. C., 279.

In Twitty's case, supra, we have held that a refusal to receive goods for "transportation," and to issue a bill of lading therefor, amounts to a violation of this section, though the goods were received for storage.

In Garrison's case, supra, it was held that the placing of goods for shipment in the car of the company, permitted by the agent, with a demand for shipment, and accompanied by a continuous offer of prepayment of freight, were facts from which a tender day by day should be inferred until the shipment was made.

The case of Cotton Mills v. Ry., at the present term, in no way conflicts with this position. That case only holds that where goods were on a platform, under circumstances leaving it doubtful whether

they had been taken charge of by the company, with other facts which left the matter of a tender day by day in doubt, the question was properly referred to a jury to decide as to whether such tender had been made. And the opinion of the Court on a former appeal in this cause, 149 N. C., 423, is a direct decision on the validity of the statute to be enforced by orderly and proper procedure; the Court holding, on facts substantially similar to those presented here, as follows:

"1. A refusal by the carrier's agent to receive, at its depot, freight, and transportation charges therefor, destined for a point on the carrier's road which was only a siding, and was not a regular station, is wrongful, and subjects the carrier to the penalty prescribed by Revisal, sec. 2631, when the refusal is on the ground that the agent did not know where the given destination was, and it appears that he could have ascertained that freight was ordinarily shipped there on way bills made out to a regular station on the carrier's road some two miles distant therefrom.

48 2. "When a shipment of freight and transportation charges are refused by carrier's agent because he did not know where its given destination was, and it appears that the name given was very slightly changed from that appearing on the 'Official Railway Guide and Shipping Guide' used by the carrier; the fact that another agent, who afterwards took the place of the first, promptly learned the location of the destination and the rate, and gave bill of lading and made shipment, is evidence that the rate and destination could have been ascertained by the first from the information given him, in an action for the penalty prescribed by Revisal, sec. 2631.

3. The penalty arising under Revisal, sec. 2631, from the wrongful refusal of carrier's agent to accept an interstate shipment of freight, bears no relation to the Commerce Clause of the Federal Constitution, for the penalty accrues before the freight is accepted for transportation.

4. The shipper of the goods is the 'party aggrieved,' and is the one entitled to sue for the penalty prescribed in Revisal, sec. 2631, which arises from the wrongful refusal of the carrier's agent to accept them for transportation."

It was chiefly urged for error, on the part of the defendant company, that the statute in question was invalid, because an unlawful interference with interstate commerce, and we were referred by counsel to several decisions of the Supreme Court of the United States as tending to support their position; notably the case of McNeil v. Southern Ry., 202 U. S., 543; Houston and Texas Central Ry. Co. v. Mayes, 201 U. S., 321; Railroad v. Murphy, 196 U. S., 194.

It may be, as indicated in the former opinion in this cause, that the Commerce Clause of the Federal Constitution is not involved in the case, on the ground therein stated, that the penalty accrues before the "freight is accepted for transportation," and on the principle applied in the case of Coe v. Errol, 116 U. S., 517; but conceding that the goods when tendered *fro* transportation to another State, as to matters involved in such transportation, and in reference to these penalty Statutes, should be considered and dealt with as Interstate

Commerce, we are of opinion that the position of the counsel cannot be sustained, and that they do not correctly interpret the cases cited and relied on by them.

In the case of Morris-Scarboro-Moffitt Co. v. The Express Co., 146 N. C., 167, the plaintiffs sued for penalty imposed by Section
49 2634 of the Revisal, for unlawful failure on part of defendant company to adjust and pay a valid claim for loss or damages to goods shipped from another State, and it was held:

"2. Revisal, sec. 2634, is not repugnant to or in contravention of Article 1, section 8, of the Constitution of the United States, conferring upon Congress the power to regulate commerce between the States. The penalty is in direct enforcement of the duties encumbent on the carriers by law to adjust and pay for damages due to their negligence; is imposed for a local default arising after the transportation has terminated; is not a burden on interstate commerce, but in aid thereof, and, in the absence of inhibitive congressional legislation, the matter is the rightful subject of State Legislation."

And in the opinion, page 171, the Court said:

"The decisions of the Supreme Court of the United States have uniformly held that under this clause of the Constitution commerce between the States shall be free and untrammeled by any regulations which place a burden upon it, and these decisions also hold that, in the absence of inhibitive congressional legislation, a State may enact and establish laws and regulations on matters local in their nature which tend to enforce the proper performance of duties arising within the State, and which do not impede, but aid and facilitate, intercourse and traffic, though such action may incidentally affect interstate commerce. Calvert on Regulation of Commerce, pp. 76, 152, 159." Citing in support of this position; "Mobile v. Kimball, 102 U. S., 691; Smith v. Alabama, 124 U. S., 465, 476; Telegraph Co. v. James, 163 U. S., 650; Railway v. Solan, 169 U. S., 133-137" and other authorities, and quoting from the opinion of Mr. Justice Matthews, in Smith v. Alabama, supra, as follows:

"It is among these laws of the States, therefore, that we find provisions concerning the rights and duties of the common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier, exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to
the proper consignee at the right time or place, he is liable in
50 an action for damages under the laws of the State in its courts; or, if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in Sherlock v. Alling, above cited."

The Court, then referred to the cases cited and relied upon by defendant, as follows:

"We were referred by counsel to cases of Railway v. Murphy, 196 U. S., 195; Railway v. Mayes, 201 U. S., 321; McNeal v. Railway, 202 U. S., 543, but we do not think that these decisions are in conflict with the views we have held to be controlling in the case before us. As we understand them, they all proceed upon the idea not that the regulations in question were void because they affected in some way interstate commerce, but because they interfered directly with intercourse and traffic between States and were of a character that imposed and undoubted and distinct burden upon them."

As showing that this is a correct deduction from these authorities, in McNeil's case, supra, Mr. Justice White, for the Court, said:

"Without at all questioning the right of the State of North Carolina in the exercise of its police authority to confer upon an administrative agency power to make reasonable regulations concerning the place, manner and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subjects made by the State or under its authority which directly burdens interstate commerce is a regulation of such commerce and repugnant to the Constitution of the United States."

In Mayes' case, supra, Associate Justice Brown, among other things, said:

"While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public
51 calamities. transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather."

And, in Railway v. Murphy, supra, Mr. Justice Peckham, delivering the opinion, said:

"The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the State, with regard to the transportation of articles of commerce; it prevents a valid contract of exemption from taking *taking* effect, except upon a very onerous condition, and it is not of that class of state legislation which has been held to be rather an aid to than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract, unless such carrier comply with the provisions of the stat-

ute by obtaining information which it has no means of compelling another carrier to give, and yet if the information is not obtained the carrier is to be held liable for the negligence of another carrier over whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it."

In Garrison v. Railway, at the present term, the Court has held, Associate Justice Connor delivering the opinion, that the Statute in question here is not an arbitrary requirement permitting no defense, but that, "when the carrier shows the existence of conditions for which it is not responsible, preventing and rendering impossible the discharge of the duty, it will not be liable for the penalty"; and quotes with approval from an opinion by Ashe, J., as follows:

"When the facts show that by force *and* circumstances for which it is in no way responsible the carrier was disabled from performing the duty imposed by the Statute, it would be unjust to punish it for failure to comply with its requirements."

To like effect is Whitehead v. R. R., 87 N. C., 255; Keeter, v. Ry., 86 N. C., 346; Branch's case, 77 N. C., 347. The Statute,
52 therefore, does not come under the condemnation expressed in these decisions of the United States Supreme Court, but it is always open to defendant to offer satisfactory excuse and explanation for an apparent default, and this opportunity was given the defendant on the trial of the present case.

Since the decision of Morris-Scarboro-Moffitt Co. v. Express Co. was rendered, the Supreme Court of the United States, the final authority of these matters, has held on a question relevant to this enquiry:

"That, notwithstanding the creation of the Interstate Commerce Commission and the delegation to it by Congress of the control of certain matters, a State may, in the absence of express action by Congress or by such Commission, regulate for the benefit of its citizens local matters indirectly affecting interstate commerce."

This principle was announced and sustained in Railway v. Flour Mills, 211 U. S., 612, a case which involved the right of the Court to compel a railroad, or a common carrier, to place cars on a siding which had been prepared for the purpose and for the benefit and convenience of a Flouring Mill, engaged in making shipments of interstate commerce. So far as we have been enabled to discover, there has been no act of Congress or regulation of the Interstate Commerce Commission, which undertakes to deal directly with this question *to* the reception of freight for shipment, certainly none in reference to its safety and prompt dispatch; and, until this is done, we are of opinion that the matter comes within the principle of the numerous authorities referred to, and continues to be a subject for proper and reasonable State Regulation.

It does not appear from the testimony that the defendant has not filed its schedule of rates with the Interstate Commerce Commission to Scottville, Tennessee, for it can hardly be seriously contended that the difference between Scottville, Tenn., and Scottsville, Tennessee is of the substance. The presumption is that the company has com-

plied with the law. And if it were otherwise, we are of opinion that the Act of Congress, and the orders of the Commission made thereunder, requiring the publication of rates, was made for an entirely different purpose from that involved in this enquiry, and does not constitute such interfering action. See Harrell v. Ry., 144 N. C., pp. 540-541.

Nor do we think that the Statute imposes any burden upon interstate commerce as applied to the facts of this particular case. While one of defendant's witnesses stated in his examination, in
53 chief, that the Knoxville and Augusta Road was operated as an independent line, the witness evidently could have meant only that a separate organization was maintained for purposes of local management and control. This is no doubt required by its charter, or the general statutes of the State of Tennessee, but it is also conclusively established from the statement of the witness on his cross-examination, that the K. & A. Road is operated by defendant company, all the money being sent to its Treasurer, the reports being made to its Auditor, and all salaries of all employees being paid by the defendant. This being true, the agent of the defendant should have known of the placing of this siding and the rate thereto, or should have ascertained the same in the exercise of reasonable care, and this was the only burden which was placed upon the defendant, and any fact or circumstance which might have tended to indicate hardship or oppression would seem to be effaced by the fact admitted; that in two days after the coming of a new man, and while the former agent was still in charge, the goods were received and shipped, and reached their destination in due course without further annoyance or delay. Nor is there any merit in the suggestion that the plaintiffs suffered no pecuniary injury by reason of the delay. Speaking to this question, in Summers v. Railroad, 138 N. C., 298, this Court said:

"These penalties are not given solely on the idea of making pecuniary compensation to the person injured, but usually for the more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment."

We are of opinion that, in the absence of inhibitive congressional legislation, or of interfering action on the part of the Interstate Commerce Commission, the Statute in question is a valid regulation in direct and reasonable enforcement of the duties incumbent on defendant as a common carrier; that on the trial the defendant was afforded full opportunity to make defenses, and the facts presented disclose no substantial excuse or explanation for its default; that no error appears in the record which gives the defendant any just ground of complaint, and the judgment against it is, therefore, affirmed.

No Error.

54 BROWN, *J.*, dissenting:

This is a civil action to recover a penalty under Section 2631, of the Revisal of 1905, for failure to receive a carload of shingles to be shipped from Rutherfordton, N. C., to Scottsville, Tenn. The fol-

lowing issue was submitted: "Is the defendant indebted to the plaintiff for the unlawful failure to receive a carload of shingles to be transported to Scottsville, Tenn., as alleged, if so in what sum?" Answer: Three hundred and fifty dollars."

1. I am of opinion that upon the entire evidence there was but one tender and that in no event can a penalty for more than one day be recovered. When the agent of defendant refused to issue the bill of lading, and gave his reasons for it, then and there plaintiff told the agent that when he found what the freight rate was, to let him know, and he would prepay it; agent replying that when he got instructions how to ship he would issue bill of lading and ship shingles. Plaintiff never had a further conversation with the defendant's agent from the second day of July, 1906, to the seventeenth of July, 1906, when one Castles came to plaintiff's place of business to inquire about the car. Plaintiff further testified that he never lost a cent by the shipment being delayed.

On July 17, Castles came to relieve defendant's agent, Gunnels, and went in to see Reid about the car of shingles. Reid showed him correspondence that he had received from James Haddock relative to the delay of the shipment of shingles, stating that Scottsville was on the K. & A. Railroad. In the meantime the freight office at Columbia, S. C., was also trying to locate Scottsville, and received a wire from defendant's agent at Knoxville, that Scottsville was a siding on the K. & A. Railroad a few miles out from Knoxville. The information was forwarded to Gunnels on the nineteenth of July, and the bill of lading was issued and the car was moved that day. The standard railroad guides and directories do not show a Scottsville or a Scottville anywhere in Tennessee.

These undisputed facts show that there was only one tender and that the plaintiff made no further tender but acquiesced in the delay incident to locating Scottsville, the place of destination, ad-
55 mitted to be not on defendant's lines of railway.

This puts the case, in my opinion, squarely on "all fours" with the opinion of this Court at *the* this term in Cotton Mills v. Railway.

2. I think this transaction from its inception related solely to interstate commerce and that the State statute can not apply.

The car was ordered for the purpose of shipping shingles to a point in Tennessee. The Act of furnishing cars for such shipments was held to be interstate commerce by the Supreme Court of the United States in Houston and Texas Pacific Railroad v. Mayes, 201 U. S., 321, because it was one of the steps necessary to the culmination of the transaction.

The car in this case had been duly furnished and was loaded with the shingles or articles to be shipped. The next step to complete the transfer of the title and the exchange of commodities was for the shipper to give shipping instructions and receive from the railroad company a bill of lading.

The shipper claims that he gave instructions to ship to James Haddock at Scottsville, Tenn. Thus making it an inter-state transaction. The statute in question, and under which this action is

brought, undertakes to regulate the terms and conditions upon which the bill of lading shall be issued by the carrier. The bill of lading demanded was not to a point in this State but to a point in Tennessee.

The contract which the defendant was required to enter into was a contract of carriage of freight from one State to another.

Such contracts not only partake entirely of the character of interstate commerce but they are actually regulated by the Interstate Commerce Commission under the authority of Federal law. Congress has legislated on the subject and made regulations in reference to the publication of rates for interstate commerce and otherwise taken control through the Commission of all matters relating to the shipment of freight from one State to another. Act of June 29, 1906 Sec. 6. This section of the Interstate Commerce Act provides "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the
56 same are transported by said carrier, have been filed and published in accordance with this Act; nor shall any carrier charge or demand or collect or receive, a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff, filed and in effect at the time."

It is undisputed that the defendant Co. had never filed with the interstate — commission and had never published a tariff to Scottsville or Scotville, Tenn. for the reason that its officers had never heard of any such place. This appears in plaintiff's own testimony.

It turns out upon investigation that Scottsville is not and never has been a shipping point upon any railway but that it is only a flag station and siding on the K. & A. R. R. and that all freight destined to it is billed to Rockford, Tenn.

Thus it appears that if defendant's agent had issued the bill of lading to Scottsville and fixed the freight rates thereto and received the money, he would have violated the Act of Congress which I have referred to and would have subjected the defendant to prosecution by the Federal Government.

Surely the defendant cannot be penalized by a State for not issuing a bill of lading in violation of the Act of Congress in a matter over which the latter has exclusive control.

3. It is admitted that the plaintiff when he tendered the car demanded a bill of lading to a point in Tennessee not on defendant's system.

The evidence is undisputed that defendant's agent consulted Standard Railway guides and endeavored to locate Scottsville and *were* delayed in finding it for the reason that all freight destined to Scottsville was waybilled or consigned to Rockford; all freight originating at Scottsville was waybilled or consigned from Rockford. There is a siding at Scottsville, put there for the accommodation of a brick plant, and up to the time of this shipment, the Knoxville & Augusta Railroad upon whose line Scottsville is situated had never received any shipments for that siding.

57 Upon these facts it is contendes that defendant's agent was required to receive the car eo instanti, issue bill of lading to Scottsville (the first and only shipment from any point), enter into a contract for the carriage of the shingles to this point, and state the freight rate, when none had been established.

The mere statement of the contention I think demonstrates its unreasonableness.

A common carrier may contract to deliver freight to a point beyond its own lines, but it cannot be compelled to do so. Hutchinson on Carriers Sec. 145 and cases cited in notes. The liability of the carrier beyond the terminus of its own line must be based on contract, and no authority has been shown, and none exists so far as my researches have discovered, to the effect that a State can compel an interstate carrier to enter into such a contract and give a through bill of lading to points in another State beyond its own lines and penalize the carrier for its refusal.

The condition of the tender of the car was that the defendant should contract to deliver it to a point in another State beyond its own line. It necessarily follows that if defendant cannot be compelled by the State to enter into such a contract against its will, it cannot be penalized for refusing to receive the car. A defense that may be interposed against the shipper for damages may be interposed in a suit for the penalty. Garrison v. Ry. Hardware Co. v. Ry., both at this term. R. R. v. Mayes—Supra; McNeill v. R. R., 202 U. S. 543.

For the reasons given I think the defendant's motion to non suit should have been allowed.

Walker, J., concurs in dissenting opinion.

58 (Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Rutherford County:—upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable W. A. Hoke, Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed. And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this Court incurred, to-wit, the sum of Twelve 65/100 dollars ($12.65), and execution issue therefor.

59 *Certificate.*

I, Thomas S. Kenan, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record on file in this Court in the case of Reid & Beam against the Southern Railway Company.

Given under my hand and seal of said Court at office in Raleigh on this the 24th day of June, 1909.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court of North Carolina.

Endorsed on cover: File No. 21,739. North Carolina Supreme Court. Term No. 80. Southern Railway Company, plaintiff in error, vs. C. C. Reid and Edward Beam, copartners under the firm name of Reid & Beam. Filed July 1st, 1909. File No. 21,739.

20

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 487.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

D. L. REID AND WIFE, ETTA C. REID,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

MOTION TO ADVANCE.

ALFRED P. THOM,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 487.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

D. L. REID AND WIFE, ETTA C. REID,
DEFENDANTS IN ERROR.

MOTION TO ADVANCE.

And now comes the plaintiff in error in the above-entitled cause, and upon the record therein in this court respectfully moves the court that said cause be advanced and set down for hearing with the case of Southern Railway Company, plaintiff in error, *vs.* C. C. Reid and Edward Beam, co-partners under the firm name of Reid & Beam, defendants in error, No. 80, and that said cases be heard together as one case.

Statement of the Matter Involved and Grounds for This Motion.

In this case defendants in error instituted an action against Southern Railway Company, plaintiff in error, in the Superior Court of Mecklenburg County, North Carolina, to recover penalties and damages for the failure and refusal of said Southern Railway Company to receive goods tendered to it by Etta C. Reid, defendant in error, at Charlotte, North Carolina, for transportation to a point in the State of West Virginia, said penalties and damages being claimed by virtue of the provisions of a statute of the State of North Carolina, being section 2631 of the North Carolina Revisal of 1905. Judgment was rendered in said Superior Court in favor of defendants in error, D. L. Reid and Etta C. Reid against Southern Railway Company, which judgment was on appeal affirmed by the Supreme Court of North Carolina.

In the above-mentioned case of Southern Railway Company *vs.* Reid & Beam, No. 80, defendants in error instituted an action in the Superior Court of Rutherford county, North Carolina, against Southern Railway Company to recover penalties for the failure and refusal of said Southern Railway Company to receive goods tendered to it by Reid & Beam, defendants in error, at Rutherfordton, North Carolina, for transporta-

tion to a point in the State of Tennessee, said penalties being claimed by virtue of the provisions of the same statute of North Carolina, section 2631 of the North Carolina Revisal of 1905, above mentioned. Judgment was rendered in said Superior Court in favor of defendants in error, Reid & Beam, against Southern Railway Company, which judgment was on appeal affirmed by the Supreme Court of North Carolina.

These cases were brought here by Southern Railway Company claiming, in each case, that the statute of North Carolina upon which said judgments were based is, as applied to the facts out of which these causes arose, in contravention of the Constitution of the United States and in conflict with the laws of Congress passed in pursuance thereof.

The cases involve similar questions, the only difference in the considerations applicable being that the alleged cause of action in the present case, No. 487, arose after the act of Congress of June 29, 1906, known as the Hepburn Act, amending the Act to Regulate Commerce, became effective, whereas in the Reid & Beam case, No. 80, the alleged cause of action arose after the passage but before the effective date of said act.

It is therefore respectfully suggested that it will conserve the time and promote the convenience of this court if this case, No. 487, be advanced on the docket and heard with case No. 80.

Notice of this motion has been served upon opposing counsel.

ALFRED P. THOM,
Counsel for Plaintiff in Error.

OCTOBER, 1911.

Service of notice of this motion accepted this — day of October, 1911, such motion to be made October 9, 1911, and we join in motion to advance.

STEWART & McRAE,
Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 80.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

C. C. REID AND EDWARD BEAM, COPARTNERS UNDER THE FIRM NAME OF REID & BEAM, DEFENDANTS IN ERROR.

No. 487.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

D. L. REID AND WIFE, ETTA C. REID, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR PLAINTIFF IN ERROR.

JOHN K. GRAVES,
Attorney for Plaintiff in Error.

ALFRED P. THOM,
Counsel.

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C. C. REID AND EDWARD BEAM, COPARTNERS UNDER THE FIRM NAME OF REID & BEAM, DEFENDANTS IN ERROR.

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SOUTHERN RAILWAY COMPANY,
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vs.

D. L. REID AND WIFE, ETTA C. REID, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

The above cases involve entirely distinct causes of action, but, under the order of this Court granting plaintiff in error's motion to advance in No.

487, are to be heard together, since they involve similar questions, the only difference in the considerations applicable being that the alleged cause of action in the Reid & Beam case, No. 80, arose after the passage, but before the effective date, of the act of Congress of June 29, 1906, known as the Hepburn act, amending the Act to Regulate Commerce, whereas in the Reid & Reid case, No. 487, the alleged cause of action arose after the effective date of said act.

In No. 80, Southern Railway Company *vs.* Reid & Beam, defendants in error, on September 10, 1906, instituted an action in the Superior Court of Rutherford County, North Carolina, against Southern Railway Company to recover penalties for the failure and refusal of said Southern Railway Company, on dates from July 2 to July 19, 1906, to receive goods tendered to it by Reid & Beam, defendants in error, at Rutherfordton, North Carolina, for transportation to a point in the State of Tennessee, said penalties being claimed by virtue of the provisions of a statute of North Carolina, being section 2631 of the North Carolina Revisal of 1905. Judgment was rendered in said Superior Court in favor of the defendants in error, Reid & Beam, for $350, against Southern Railway Company, which judgment was on appeal affirmed by the Supreme Court of North Carolina.

In No. 487, Southern Railway Company *vs.* Reid & Reid, defendants in error, on December 18,

1907, instituted an action against Southern Railway Company, plaintiff in error, in the Superior Court of Mecklenburg County, North Carolina, to recover penalties and damages for the failure and refusal of said Southern Railway Company, on dates from September 17 to September 23, 1907, to receive goods tendered to it by Etta C. Reid, defendant in error, at Charlotte, North Carolina, for transportation to a point in the State of West Virginia, said penalties and damages being claimed by virtue of the provisions of the statute of the State of North Carolina, being section 2631 of the North Carolina Revisal of 1905, above mentioned. Judgment was rendered in said Superior Court in favor of defendants in error, D. L. Reid and Etta C. Reid, against Southern Railway Company for $275, which judgment was on appeal affirmed by the Supreme Court of North Carolina.

These cases were brought here by Southern Railway Company claiming, in each case, that the statute of North Carolina upon which said judgments were based is, as applied to interstate shipments, in connection with which these causes arose, in contravention of the Constitution of the United States and in conflict with the laws of Congress passed in pursuance thereof.

The evidence in No. 80 will be found at pages 11-14, inclusive, of the transcript, and the statement of facts by the Supreme Court of North Carolina on pages 28 and 29.

In No. 487 the agreed statement of facts will be found at pages 12-16 of the transcript.

As we shall have occasion to discuss the facts of each case in the argument in connection with the discussion of the construction which has been placed upon the statute herein involved by the North Carolina Supreme Court in these and other cases (see *infra*, pp. 30, 34), it is unnecessary here to set forth such facts in greater detail.

The North Carolina statute attacked in these cases is as follows:

> "Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side-track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or workhouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment."
>
> Code of North Carolina, 1905, sec. 2631.

Assignment of Errors Relied on.

Reid and Beam Case (Transcript, page 2).

"1. The Supreme Court of North Carolina erred in holding that Section 2631 of the North Carolina Revisal of 1905, above referred to, is, as applied to the interstate shipment in the proceedings mentioned, from Rutherfordton in the state of North Carolina to Scottville in the state of Tennessee, a valid exercise of state power; inasmuch as the state statute referred to is, as applied to the shipment in question, a regulation of interstate commerce which is solely within the power of Congress under Article 1, section 8, clause 3, of the Constitution of the United States, the benefit and protection of which Southern Railway Company duly and specially set up and claimed in these proceedings.

"2. Said Court erred in holding that the state statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce forbidden to the states by being conferred exclusively on Congress by Article I, section 8, clause 3, of the Constitution of the United States, the benefit and protection of which said clause of the Constitution the Southern Railway Company duly and specially set up and claimed in these proceedings.

"3. Said Court erred in holding that the state statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce beyond the power of the state to make, inasmuch as Congress in the Act to Regulate Interstate Commerce had already acted and had thus assumed jurisdiction over the entire subject-matter of this action, the benefit and protection of which Act of Congress the defendant, Southern Railway Company, duly and specially set up and claimed in these proceedings.

"4. Said Court erred in denying to the plaintiff in error, Southern Railway Company, the right, privilege or immunity of being governed, in respect to said shipment, solely by the Constitution of the United States and the Interstate Commerce Act of Congress, and in adjudging said plaintiff in error, in respect to receiving and forwarding said shipment, to be subject to the state statute referred to herein, and in thus denying to Southern Railway Company the right, privilege or immunity aforesaid, which it duly and specially set up and claimed in these proceedings."

Reid and Reid Case (Transcript, page 3).

"1. The Supreme Court of North Carolina erred in holding that Section 2631 of the North Carolina Revisal of 1905, above referred to, is, as applied to the interstate shipment in the proceedings mentioned, from Charlotte, in the state of North Carolina, to Davis, in the state of West Virginia, a valid exercise of state power; inasmuch as the state statute referred to is, as applied to the shipment in question, a regulation of interstate commerce which is solely within the power of Congress under Article I, section 8, clause 3, of the Constitution of the United States, the benefit and protection of which Southern Railway Company duly and specially set up and claimed in these proceedings.

"2. Said Court erred in holding that the state statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce forbidden to the states by being conferred exclusively on Congress by Article I, section 8, clause 3, of the Constitution of the United States, the benefit and protection of which said clause of the Constitution the Southern Railway Company duly and specially set up and claimed in these proceedings.

"3. Said Court erred in holding that the state statute referred to is not, as applied to the interstate shipment in the proceedings mentioned, a regulation of interstate commerce beyond the

power of the state to make, inasmuch as Congress in the Act to Regulate Interstate Commerce had already acted and had thus assumed jurisdiction over the entire subject-matter of this action, the benefit and protection of which Act of Congress the defendant, Southern Railway Company, duly and specially set up and claimed in these proceedings.

"4. Said Court erred in denying to the plaintiff in error, Southern Railway Company, the right, privilege or immunity of being governed, in respect to said shipment, solely by the Constitution of the United States and the Act to Regulate Commerce of Congress, and in adjudging said plaintiff in error, in respect to receiving, issuing a bill of lading for, and forwarding said shipment, to be subject to the state statute referred to herein, and in thus denying to Southern Railway Company the right, privileges or immunity aforesaid, which it duly and specially set up and claimed in these proceedings."

ARGUMENT.

In each of these cases plaintiff in error alleged in its answer that the North Carolina statute was in contravention of the commerce clause of the Federal Constitution and in conflict with the acts of Congress enacted in pursuance thereof, more especially the Act to Regulate Commerce and the acts amendatory thereof, and the benefit and protection of the commerce clause and of the Federal acts regulating interstate commerce were specially set up and claimed in its answers, and insisted upon at the subsequent stages of the causes in motions, prayers for instructions and assignments of error, and in argument upon the trials and in the appellate court, as will appear from the records and from the opinions of the North Carolina Supreme Court set forth therein.

For the purposes of the first branch of our argument, we will assume that Congress has not exercised its power with respect to the matters involved in the cases and, upon that assumption, address ourselves to the proposition that—

I.

The North Carolina statute contravenes the commerce clause of the Constitution because it seeks to regulate, and, if enforced, will impose a burden upon, interstate commerce.

We shall not argue the proposition that the receiving by a carrier of goods tendered at a point in one State for transportation to a point in another State and the duties of the carrier with respect thereto are matters of interstate commerce and, therefore, within the power of Congress, but will merely cite several decisions of this Court conclusively supporting that proposition.

Gibbons *vs.* Ogden, 9 Wheat., 1, 189, 210.

Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 204.

Western Union Telegraph Co. *vs.* James, 162 U. S., 650.

Houston, etc., R. Co., *vs.* Mayes, 201 U. S., 321.

McNeill *vs.* Southern Ry. Co., 202 U. S., 543.

St. Louis, etc., R. Co. *vs.* Arkansas, 217 U. S., 136, 150.

Atlantic Coast Line R. Co. *vs.* Riverside Mills, 219 U. S., 186.

The decisions of this Court clearly lay down the principles to be applied in the determination of

whether a statute of the sort here involved does or does not contravene the Federal Constitution. Among others, the following may be cited as showing where the line is to be drawn:

Statutes upheld:

Western Union Tel. Co. *vs.* James, 162 U. S., 650.

Richmond, etc., R. Co. *vs.* Patterson Tob. Co., 169 U. S., 311.

Atlantic Coast Line R. Co. *vs.* Mazursky, 216 U. S., 122.

Western Union Tel. Co. *vs.* Commercial Milling Co., 218 U. S., 406.

Western Union Tel. Co. *vs.* Crovo, 220 U. S., 364.

Statutes condemned:

Western Union Tel. Co. *vs.* Pendleton, 122 U. S., 347.

Central of Ga. Ry. Co. *vs.* Murphey, 196 U. S., 194.

McNeill *vs.* Southern Ry. Co., 202 U. S., 543 (order of North Carolina Commission).

Houston, etc., R. Co. *vs.* Mayes, 201 U. S., 321.

St. Louis, etc., R. Co. *vs.* Arkansas, 217 U. S., 136.

On this branch of the case the question of the constitutionality of the North Carolina statute will be answered by a determination of whether the

statute is to be classified with the statute upheld in the James case, *supra*, or is to be assigned to the category of statutes such as that condemned in the Mayes case, *supra*.

In order to answer this question, it is necessary to determine what the statute, as construed by the Supreme Court of North Carolina, requires.

THE QUESTION IS WHETHER THE STATUTE IS CONSTITUTIONAL AS APPLIED TO INTERSTATE COMMERCE, NOT WHETHER THE IMPOSITION OF THE PENALTIES IN THESE PARTICULAR CASES MIGHT HAVE BEEN CONSTITUTIONALLY AUTHORIZED.

But before proceeding to call attention to the provisions of the statute, to the decisions of the State court construing them, and to the constitutional invalidity of the statute as applied in these cases, we wish to emphasize the proposition that the question here at issue is the constitutionality of the statute as applied to interstate commerce, and not the validity of the applications made of it by the imposition of a penalty upon the plaintiff in error under the circumstances of these particular cases. The test is not whether the State might have enacted a valid statute under which the penalties in question would lawfully have been visited upon plaintiff in error for the acts or omissions on account of which these cases were brought, but whether the State has enacted a law which, so far as interstate commerce is concerned, is valid as

applied to all cases falling within it. It is true that courts do not sit to determine moot questions, and that one may attack the validity of a law only "by reason of an interest in the litigation which has suffered or may suffer" (Tyler *vs.* Judges, 179 U. S., 405; Turpin *vs.* Lemon, 187 U. S., 61), but one upon whom a penalty has been imposed under the provisions of a statute has an interest which has suffered, and is entitled to challenge the validity of the statute as applied to all cases within its operation. Otherwise, the question of the constitutionality of a penal (or, indeed, any) statute, as a statute, could never arise, and all the statutes on the books would be valid; the question, in each case, would simply be, not whether the statute was invalid, but whether the statute could be constitutionally applied so as to penalize the particular person under the special facts of the case.

In this connection the language of Chief Justice Waite in United States *vs.* Reese, 92 U. S., 214, 222, is pertinent:

> "It would certainly be dangerous if the legislature could set a dragnet to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government.

If it is for the court to declare whether the carrier should be excused or not, in the particular

case before it, regardless of whether the statute contain any exception, the law would in effect be enacted by the judiciary, and no person could look to the terms of the enactment itself for guidance as to his future conduct. Such a situation would remind one of the Chinese law which declared that all wrongdoers should be punished without defining what constit ed a wrong.

If the citation of authority be necessary to dispose of this question, it may be found in the decision of this Court in the Mayes case, 201 U. S., 321. There a Texas statute penalizing carriers for failure to furnish cars within a designated time was held invalid, as applied to interstate shipments, on the ground that exceptions were not made for cases which *might* occur in which the carrier might be unable, though not at fault, to furnish the cars within the time specified. The record in that case will be searched in vain for evidence of a washout, or sudden congestion of traffic, or unavoidable detention of cars in other states or in other places in the same state, or any other circumstances which this Court declared should excuse the railroad company from furnishing the cars applied for; but this Court took judicial notice of the fact that such calamities or situations *might* occur and that the statute for that reason was "likely" to do great injustice to the carriers, and therefore declared it invalid as applied to interstate shipments and reversed the decision of the Texas court,

which had decreed that Mayes should, in that case, pay the penalties imposed by the statute.

Were the law otherwise, however, we contend, and shall hereafter point out, that the record in these cases affirmatively shows situations under which the imposition of the penalties actually operated to regulate and burden interstate commerce.

PROVISIONS OF THE STATUTE AS CONSTRUED BY THE SUPREME COURT OF NORTH CAROLINA.

Coming now to the question of whether the statute is merely in aid of a common-law duty (James case), or whether it regulates interstate commerce (Mayes case), we find that the statute requires the carrier to receive freight of the kind which it professes to carry

> "*whenever* tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding,"

and

> "to forward the same by the route selected by the person tendering the freight under existing laws,"

under penalty of a fine of fifty dollars for each day the carrier refuses to receive the freight, and in

addition thereto liability for all damages actually sustained by the refusal to receive.

It will be observed that on its face the statute is rigid, requiring freight to be received *whenever* tendered. No exception is made for any cause or under any circumstances whatever. The statute condemned in the Mayes case contained the proviso that it should not apply "in cases of strikes or other public calamity;" the statute here involved contains no such, nor any, proviso or exception. Unless, therefore, the rigor of the statute has been abated by the construction placed upon it by the North Carolina Supreme Court, we have only to refer to the Mayes decision as conclusive of these cases.

Let us see what construction has been placed upon the statute by the highest court of the State.

In the first place, does the phrase "under existing laws" in any way qualify, or modify, the duty to receive freight whenever tendered by defining or describing the circumstances under which the "tender" will give rise to the duty to receive? The question is directly answered by the North Carolina Supreme Court in Alsop *vs.* Express Co., 104 N. C., 278, where it was claimed that the phrase "under existing laws" modified the verb "tendered," and that the tender did not comply with such laws. The contention was emphatically overruled, the court holding that the phrase modified the verb "forward" only; that the requirement was to "*forward* them" (the goods received)

"*under existing* laws, fixing the legal relations of consignor and consignee, and the duties and liability of the carrier company and its connecting lines."

In that case the question was whether the express company was liable to a penalty under the statute (section 1964 of the Code of 1883, which is substantially the same as section 2631 of the Code of 1905) for refusing to receive money tendered to it at 2 p. m. on a certain day when the next train which carried express was not scheduled to leave the point at which the money was tendered until noon the next day. In reaching the conclusion that the express company was liable, the court had occasion to trace the origin of the statute thus (pp. 284, 285):

> "The study of the several statutes relating to the receipt and shipment of goods by corporations, will shed further light upon the legislative intent in enacting section 1964 of the Code. By the act of 1871-72, ch. 138, section 35 (the Code, section 1963), it was prescribed that railroad companies should furnish sufficient accommodations for such freights and passengers as should, 'within a reasonable time previous thereto, be offered for transportation,' and should be liable in damages to the party aggrieved for neglect or refusal to provide such means of transportation. Subsequently, the legislature seems to have realized that the requirement to furnish accommodations within a reasonable time was but a reaffirmance of the common law (leaving the courts

to say what time was reasonable), and, therefore, passed the act of 1874-75 (the Code, section 1766) fixing the limit of delay in shipment at five days after delivery by the consignor. This law was pronounced constitutional in Branch *vs.* Railroad Co., 77 N. C., 347, and railroad companies were held liable for the penalty for delay in shipping freight, as prescribed in that section. Then it was (when the opinion was rendered in Branch *vs.* Railroad Co., in the year 1877) that the discussion arose as to the right of a consignor to compel a railway corporation to receive freight when offered for shipment, and store it in its warehouse till cars could be procured to transport it.

"The act of 1879 (the Code, section 1964) was passed to meet the suggestion that the ancient principle, laid down as applicable to the cumbrous old conveyances two hundred years ago, still survived and conferred on the railroad companies the power to compel the shipper to camp with his wagon at the station and guard his goods till the last hour of time fixed by law, and receive them only when the train was on the eve of departure."

And the court continued to point out that the statute was designed not simply to impose a penalty for the failure or refusal of the carrier to comply with the obligations which it had owed at common law, but created more rigorous duties on the part of the carrier, thus (page 287):

"If, for the sake of argument, it be admitted that the General Assembly meant to

inaugurate no change, but simply to publish the vain and empty declaration that transportation companies would hereafter, just as heretofore, receive freight under 'existing laws,' and, consequently, under any regulation made by the companies and adjudged reasonable by the courts, would it follow that the courts would declare the rule under which a wagoner engaged in carrying goods could compel his customer to wait till the horses should be hitched, reasonable and applicable to express companies?"

On pages 292 and 293 the conclusions of the court are summed up under three heads, the first two of which are:

"1. The first clause of section 1964 is in itself a full and complete expression of the legislative intent that goods shall be received *whenever tendered*, and that the language cannot, by any accepted rule of interpretation, be limited further than to require that the tender shall be made during hours that cannot be reasonably claimed, according to the usages of business men at the place of tender, for repose or for taking meals.

"2. The words '*under existing* laws' can be construed to qualify the word 'forward,' and to mean that, at least when the law is applied to railroad companies, the goods shall be shipped within five running days from delivery (as required by the Code, section 1966), and subject to the law fixing the relations of consignor and consignee, the carrier and its connecting lines, while

> the construction contended for would give the statute no effect, but leave the law as it was before its passage."

In Garrison *vs.* Southern Ry. Co., 150 N. C., 575, an action to recover penalties under the statute here involved for the failure to receive freight tendered for transportation, the court entered into a discussion of the construction of the statute. It comments upon the decision in the Alsop case just above referred to as follows (p. 582):

> "In Alsop *vs.* Express Co., 104 N. C., 278, it was held, in an able and well-sustained opinion by Mr. *Justice Avery,* that the act of 1879 (Revisal, sec. 2631) *enlarged* the common-law duty of common carriers to receive all freight tendered them for shipment by requiring them to do so 'whenever tendered.' In other words, the statute prescribes what is the reasonable time within which they must perform the duty—receive the freight. It must be tendered at a regular depot and during business hours."

In the Garrison case, the court continued (pp. 582, 583):

> "While, both at common law and with the *superadded* duty imposed by the statute, the carrier must receive the freight whenever tendered, yet, upon the authority of the cases cited, if it is shown that by reason of controlling conditions for which the carrier is not responsible, such as the destruction by fire of warehouses, wharfs, platforms, tracks, etc., before a reasonable time

> to rebuild has elapsed or the unexpected tendering of an extraordinary quantity of freight at a depot, and probably other unforeseen causes, the duty cannot be performed, it would not be liable for the penalty. It is not practicable in the discussion of this appeal to do more than apply these general principles to the facts in the case."

This language occurs in the opinion after a reference to the decision of this court in the Mayes case, and is obviously an attempt to take the statute of North Carolina without the operation of the principles under which the Texas statute was here condemned. These expressions of the North Carolina court are merely dicta, and, in view of the construction placed upon the statute by the State court in this Garrison case and other cases involving the application of the statute to the particular facts involved, are entitled to no weight in this connection. We shall see that the court while keeping the word of promise to the ear breaks it to the hope.

As illustrative of our position with respect to this feature of the case, let us assume that the North Carolina Supreme Court has placed the construction upon the statute—which was not placed upon it in the Garrison case, where the duty under the statute is declared to be a duty "superadded" to the common law—that it merely imposes a penalty upon a carrier for failure to perform its common-

law duties. Would that be conclusive of the validity of the statute? Would it thereby necessarily fall within the principles which led to the upholding of the statute in the James case? In other words, can a State court, by declaring that a certain duty was owed by the carrier at common law, thereby conclude for this Court the question of whether a statute penalizing the failure to perform such act is a regulation of or burden upon interstate commerce? If so, it is within the power of the State courts to nullify the operation of the commerce clause of the Federal Constitution by declaring that the requirement of a certain act on the part of the carrier, no matter how seriously the necessity of performing such act would impede the carrier in the conduct of its interstate business, was merely a requirement that the carrier should perform its common-law duty. It is submitted that it was not the intention of this Court, when in the James case it declared that the statute merely required the performance of the common-law duties of the telegraph company, to attach any especial importance to or lay any stress upon the common law as interpreted by the State court, but this Court, in determining whether the statute was a regulation of or burden upon interstate commerce, found that the statute was not such a regulation or burden, because it was merely designed to afford a more effective remedy to the person aggrieved in the case of failure or refusal of the carrier to do what was already required of it by the common

law, as construed by this Court. In other words, if the State court had given an interpretation of the statute, as being merely an expression of the common law, which this Court considered to create a burden upon interstate commerce, this Court would have declared the statute as thus interpreted invalid, although it might yield to the decision of the State court as to what is the common law of the State. The ultimate question is obviously the practical effect of the statute upon interstate commerce, and not any theoretical question founded upon the State court's construction of the requirements of the common law. This is illustrated in the Mayes case, where this Court declared that the Texas statute did not make sufficient allowance "for the *practical* difficulties in the administration of the law."

We have hereinbefore, in arguing for the proposition that the test of the validity of the law is not what was done under it in a particular case, but what might be done under its authority, had occasion to point out that a statute cannot be saved from invalidity by the application of the theory that the courts will relieve from a penalty a party complaining of the imposition thereof where in the particular case the imposition of the penalty was beyond the power of the legislature, and reference is now made to that part of the argument as relevant in the consideration of what weight should be given to the above quotation from the opinion of the North Carolina Supreme Court in

the Garrison case, where it undertakes to distinguish the statute from the Texas statute, declared invalid in the Mayes case, by holding out the hope to carriers that they may escape the penalties under circumstances where the State courts in their clemency should deem it proper to abate the rigor of the law.

What construction was put upon the statute by the actual decision in the Garrison case? The following statement of the facts is taken from the report of the case (pp. 577-8):

> "Plaintiff had contracted to sell lumber f. o. b. cars at Black Mountain, to Westall, at Asheville. Plaintiff hauled the lumber to Black Mountain, loaded it on cars, furnished by defendant 7 June, 1906, and demanded a bill of lading, which defendant's agent declined to give to him, upon the ground that an embargo had been placed upon shipments of lumber consigned to W. H. Westall and English & Co., at Asheville, on account of accumulation of business for them at that point. When the embargo against Westall was placed, there were many loaded cars on defendant's yard at Asheville for him, which he could not or would not handle, and this, with other conditions, created a congested condition of the Asheville yards and caused the embargo to be placed upon shipments to him. There was evidence tending to show that the defendant's yards and tracks at Asheville were congested by an unusual number of cars of freight which were left unloaded; that on 30 May, 1906, defendant's superintendent

> issued the following notice: 'To all agents, Asheville Division: Until further notice, place embargo on all shipments of lumber consigned to W. H. Westall and English & Co., at Asheville, N. C., account accumulation of business for these people at Asheville.' On 16 June the embargo against Westall was canceled.
>
> "There was evidence tending to show that, before and during the time of the embargo, defendant had on its yards and tracks at Asheville for Westall some eighteen or twenty cars of lumber—had more than could be placed on his tracks for unloading—and they occupied other tracks; that they congested the yard and occupied cars that defendant required to move other freight on the line. The traffic in the summer of 1906 was one-third heavier than ever before. Plaintiff testified that he made several demands upon defendant's agent for a bill of lading, each of which was refused, until 20 June, 1906, when he gave him the bill and shipped the car."

Upon these facts the court held that the statute applied, and that the penalty was lawfully imposed, saying (pp. 583-4):

> "This brings us to a consideration of the defense offered by defendant as an excuse for not receiving plaintiff's freight. Do they establish or tend to establish any valid, legal excuse? While plaintiff was permitted to place the lumber on the car at Black Mountain, it is conceded that defendant refused to receive it for shipment or to issue a bill of lading for it. This was a refusal

to receive. Twitty *vs.* Railroad, 141 N. C., 355. It is not suggested that any conditions existed at Black Mountain which prevented defendant from receiving for shipment all freight tendered, or that it did not have the necessary cars for the purpose of transporting, or that the track was obstructed. For any and all other persons except Westall and English & Co. the defendant was ready and able to perform its duty to receive freight for shipment. It will be observed that the plaintiff had contracted to sell the lumber and deliver to Westall f. o. b.; hence the defendant, upon receipt of the lumber, would have owed no further duty to plaintiff. For any delay in transporting and delivering within a reasonable time, as prescribed by the statute, defendant would have been liable to Westall. The defense, then, comes to this: Conditions at Asheville, to which Westall contributed by failing to unload and remove freight consigned to him, congested defendant's yards and tracks, kept cars 'tied up,' and prevented it from discharging its duty to other members of the public who might demand its services. We do not think that these conditions excused defendant from performing its duty to plaintiff at Black Mountain. If on account of the conditions existing at Asheville the cars could not be carried there and unloaded, the defendant should have provided reasonable facilities for caring for the freight at Black Mountain until it could transport it. It will be observed that the duty to receive freight is confined to such as is 'of the nature and kind received' by such carrier. This re-

lieves the defendant from all unreasonable demands in respect to the character of freight which may be tendered it. When it is remembered that, in addition to these protective provisions, the defense is open to the carrier that unforeseen, unexpected conditions not to be anticipated may be successfully urged as a defense, we do not perceive that any harsh or oppressive measure of duty is imposed upon the carrier."

After referring to the Mayes case, the court declared (p. 584):

"None of the conditions which are suggested are presented in this case, so far as receiving the freight is concerned. It was tendered at the proper place, at the proper time; was of the nature and kind which defendant shipped; the cars necessary for receiving were at the depot; there was no obstruction of the track or shortage of motive power or labor. The only reason assigned was that Westall, by refusing to unload cars consigned to him at Asheville, contributed to the congestion of the yard and tracks at Asheville. In other words, defendant refused to discharge its duty to plaintiff because Westall refused to discharge his duty to defendant at Asheville. We cannot think this a valid excuse.

"We do not intimate that defendant has any right to issue an embargo upon one or more of its customers or patrons and refuse to carry or receive any freight for him. To permit this to be done would empower the carrier to discriminate, not only against him, but against other persons from dealing with him."

Again (pp. 585-6):

> "On the other hand, we do not wish to be understood as intimating that one or more patrons of a common carrier may, by refusing or failing to receive freight consigned to him, so monopolize the car tracks, etc., as to prevent or interfere with it in the discharge of its duty to the public. The statute enacted for the enforcement of the duties of common carriers, imposing penalties, are (sic) not intended to simply penalize railroads, but to secure prompt, efficient service to all and not a favored few. The patrons owe duties to carriers and to other patrons. Reasonable rules and regulations may be made, either by the railroads or the Corporation Commission, to enforce these relative rights and duties."

The court here declares that the carrier did not sufficiently comply with the statute by permitting the freight to be loaded on its car; that it must receive "for shipment," must issue its bill of lading, in order to avoid the penalties. It is pointed out that for any unreasonable delay in transporting and delivering the carrier would have been liable to the consignee (under the North Carolina statute, section 2632, imposing heavy penalties for unreasonable delay, more than two days' delay at the initial point and more than forty-eight hours at one intermediate point for each one hundred miles being declared *prima facie* unreasonable). It was necessary for the carrier either to refuse to receive the goods and incur the penalties pre-

scribed in section 2631, or receive them and run the risk of the penalties denounced by section 2632. If it had received the car of freight and carried it to destination, the congestion at that point would have been to that extent aggravated and equipment needed by the carrier to move other freight, as shown by the record, to that extent tied up. The statute as construed in this case declares: "Receive for transportation, though you cannot make delivery, though upon receiving you will necessarily incur other penalties regardless of how diligent you may be, and though by receiving you tie up equipment needed for the performance of your duties to intrastate and interstate commerce and obstruct the movement of such commerce by increasing the congestion of your facilities."

Suppose—and the court under the decision in the Mayes case should test the act by imagining situations that may reasonably arise—a thousand carloads of freight had been tendered the carrier at various points in North Carolina for transportation and delivery to Westall at Asheville, what would have been the effect of the statute upon interstate commerce, if enforced as it was in the case under discussion?

Let us consider the case of Wampum Cotton Mills *vs.* Carolina, &c., R. Co., 150 N. C., 608. This was an action for penalties under section 2631 for the refusal of the defendant to receive a carload of cotton tendered at Lincolnton, N. C., for trans-

portation and delivery to the South Atlantic Waste Company, Charlotte, N. C. Defendant's agent declined to receive the shipment, assigning as the reason that he had instructions not to receive shipments consigned to the Waste Company because an embargo had been placed against that company by Southern Railway Company, which connected with the defendant at Gastonia and the line of which extended thence to Charlotte. It was in evidence that the tracks and yards of Southern Railway Company at Gastonia were congested. The defendant's agent offered to issue a bill of lading "subject to delay on account of embargo at Gastonia." Plaintiff declined to accept this proposal and suggested to defendant's agent to carry the goods to Gastonia and tender them to the Southern. The court held that the statute applied, saying (p. 614):

> "The sole question is whether the reasons assigned by defendant for refusing to receive for shipment constitute a legal excuse. There is no suggestion that the defendant's warehouse at Lincolnton was insufficient to care for the freight until it could be shipped, or that defendant did not have the cars, motive power, and other facilities for carrying the freight to Gastonia and tendering it to the Southern Railway. Defendant's agent says that it could have been handled as far as Gastonia. It was clearly its duty to comply with the requirement of the statute by receiving for shipment and throwing upon the Southern Railway the responsi-

> bility for failing to perform its duty at Gastonia. The fact that the Southern Railway maintained an embargo upon shipments to the waste company at Charlotte could not excuse the defendant from discharging its duty at Lincolnton. We have no doubt that the defendant's officers and agents acted in good faith in endeavoring to induce the Southern Railway to promise to take the freight at Gastonia, but this did not measure up to the standard of its common-law or statutory duty. It should have received the freight, carried it to Gastonia and then tendered it to the Southern Railway."

Surely in this case the defendant was between the devil and the deep sea. It must either receive the freight and issue a bill of lading obligating it to carry the goods to destination or at least to deliver them to its connecting carrier en route when it knew that such delivery could not be effected, thus rendering itself responsible for the safety of the cotton indefinitely, uselessly tying up its equipment, and running the risk of penalties under sec tion 2632, above alluded to; or else run the risk of the penalties prescribed in section 2631. It chose the latter alternative, and was mulcted in penalties. If it had chosen the former course, the result might have been even more disastrous.

In this connection see the decision of this Court in St. Louis, &c., Ry. Co. *vs.* Arkansas, *supra*, 217 U. S., 136, where the Arkansas statute was construed by the State court to apply to a case where

the inability of the carrier to furnish the cars demanded was due to the fact that a large part of its freight equipment had been delivered to other carriers under the rules of the American Railway Association. The Arkansas court held that the statute did not make an exception under such circumstances, but this Court held that, as applied to such a case, the statute was a burden upon interstate commerce, pointing out that the carrier was powerless to change the rules of the Association, and must either "desist from the interchange of cars with connecting carriers for the purpose of the movement of interstate commerce," or "conduct such business with the certainty of being subjected to the penalties which the State statute provided for." The practical situation determined the case. The North Carolina statute is construed in the case under discussion to make no exception of a case where the defendant carrier was powerless to *deliver* the property tendered had it accepted it.

In Burlington Lumber Co. *vs.* Southern Railway Co., 152 N. C., 70, now pending on writ of error in this Court, plaintiff tendered to the carrier at Burlington, N. C., for transportation back to Saginaw, Michigan, a blow-pipe machine which had been sent to it on trial by the manufacturers at Saginaw. Defendant's agent refused to receive the shipment, stating that he had no rates to Saginaw. He tried to get the rates next day, but did not succeed in getting them for some time, during

which penalties accrued amounting to $3,050. The Lumber Company sued the carrier in the State court for $2,000, under section 2631 (remitting for obvious reasons the balance of the penalties), and obtained a judgment for that amount, which was affirmed by the North Carolina Supreme Court by a divided court, Judge Brown (with whom concurred Judge Walker) saying in his dissenting opinion (p. 77):

> "It would seem to me that a statute which permits the recovery as penalty of over $3,000 in a small transaction by a party who has sustained no loss, and claims no actual damage, does impose an unreasonable burden upon interstate or any other kind of commerce, which few common carriers can bear and still perform their duties to the public."

The dissent was also based on the ground that it appeared from the testimony that the defendant had no rates to Saginaw, Mich., and that, there being many lines of railway, belonging to different carriers, between Burlington and Saginaw, the burden of proof rested upon the plaintiff to show that these carriers had filed and published their rates as required by the act of Congress.

It should be observed that the penalties began to accrue immediately upon the refusal to receive; not from the time the rates could be ascertained in the exercise of due diligence.

Let us now consider the construction placed upon the statute in the cases at bar.

Construction of the Statute in the Cases at Bar.

In the Reid & Beam case, No. 80, the Supreme Court of North Carolina affirmed a judgment for plaintiffs (defendants in error) for $350.00 as penalties for the violation of section 2631. Trans., p. 27. In this case, C. C. Reid, one of the plaintiffs, tendered to Southern Railway Company's agent at Rutherfordton, N. C., on July 2, 1906, a carload of shingles, directing him to transport them to *Scottsville,* Tenn., and there deliver them to one James Haddox, and plaintiff stated that he wished to prepay the freight. The agent, Gunnels, told the plaintiff, Reid, that he could not locate such a place as Scottsvillle, Tenn., but that he would wire his division freight agent at Columbia, S. C., and give Reid a bill of lading as soon as he received the rate. Accordingly he wired the division freight agent and received a reply from him saying that he could not locate such a place as Scottsville, Tenn. Trans.: Testimony, pp. 12, 13; Opinion, pp. 28, 29.

The rate clerk in the division freight agent's office testified that he received the agent's wire on July 9; that he consulted the standard books, the Railway Guide and Bullinger's Guide, but was unable to find a railway station or postoffice named Scottsville, Tennessee, and accordingly wired the agent to that effect; that on July 14 he took the matter up with the general freight agent

at Atlanta, and a few days later he was advised in a message from his superior at Knoxville that there was a point called *Scottville* on the K. & A. Railroad near Knoxville. He at once wired this information to the agent at Rutherfordton, and on the same day the bill of lading was issued. There were no through published rates from Rutherfordton to any point on the K. & A. (Trans., p. 14). There was no such point as Scottsville on the K. & A. Scottville was merely an industrial siding (and flag stop, which, of course, applies only to passengers) put in for the accommodation of a brick company. There was no agent or depot there. No railroad business was transacted at that place except in connection with the brick business. No shipment had ever been received by the K. & A. for that point (Trans., p. 13; see Opinion, Trans., p. 29). The Knoxville & Augusta Railroad was a road operated entirely independently of the Southern Railway (Trans., p. 13).

The agent testified that Reid did not tell him where *Scottsville* was (Trans., p. 13). A new agent, Castle, took the place of Gunnels about July 18, and he testified that on that date Reid "showed him some correspondence saying Scottsville was on the K. & A. R. R." On that date he wired the division freight agent and got the necessary information.

Reid testified: "I showed this letter to Gunnels on July 20. I gave him the letter open and he

looked at it; I cannot say he read it, but he had it before him and looked at it."

The Court said in its opinion (Trans., p. 35; 150 N. C., 764) that "it is always open to defendant to offer satisfactory excuse or explanation for an apparent default, and this opportunity was given the defendant," but it held that "the facts presented disclose no substantial excuse or explanation" (Trans., p. 36).

The dissenting opinion by Judge Brown, concurred in by Judge Walker, will be found beginning at page 36 of the transcript.

It will be observed that the penalty in this case was imposed for failure to issue a prepaid bill of lading to a point which was given an incorrect name, a point on the line of an independently operated carrier and a mere industrial siding where there was neither depot nor agent, to which there were no published through rates, and to which no shipment had ever been carried by railroad. Yet the statute, as construed by the North Carolina courts, operated to permit a penalty of $50 per day, beginning with the very day the shipment was offered for transportation. We shall have occasion a little further on in this argument to comment upon the effect upon interstate commerce of the situation thus created.

No duty at common law rests upon a carrier, in the absence of contract or custom, either to receive freight at or deliver to an industrial siding or non-

agency station. See Hutchinson on Carriers (3d ed.), section 122:

> "Nor can the owner of the goods require such carriers to stop anywhere except at their regular offices or stations or other usual or designated place to take on his goods. Nor can they be required to receive goods on or along a private switch. Their duties in this regard are confined and limited to their depots, or regular shipping or receiving points."

In Louisville, etc., R. Co. *vs.* Flanagan, 113 Ind., 488; 3 Am. St. Rep., 674, 676, the Supreme Court of Indiana says:

> "It is undoubtedly true that a carrier is not liable for failing to furnish cars, and for not transporting goods, unless goods are offered at a regular depot, or other usual or designated place for receiving freight: 3 Wood's Railway Law, 1580."

See also Charnock *vs.* Texas & P. R. Co., 194 U. S., 436, where it was said that Meekers, which was a flag station with a small platform and shelter on a private plantation at which the neighboring farmers were accustomed to ship their produce, "was not a regular station; indeed, was not a station at all, but a mere switch track. The defendant was not obliged to receive freight there."

These principles are recognized by the North Carolina Supreme Court with respect to the statute here involved in Kellogg *vs.* Railway Co., 100

N. C., 158, and Land *vs.* Railway Co., 104 N. C., 48, where flag stations at which there were small platforms, but no agents, warehouses, etc., were held not to be regular stations within the meaning of a statute imposing a penalty on carriers for the refusal to receive freight at "regular stations."

If there is no duty, in the absence of contract or custom, to receive freight tendered at a non-agency station, we think it follows that no common-law duty rests on the carrier to deliver at nor to accept shipments for delivery at such a point.

Let us now turn to the record in the Reid & Reid case, No. 487.

In this case there was a judgment in favor of plaintiffs (defendants in error) for $250.00 penalties and $25.00 damages for the failure of Southern Railway Company to receive and issue a bill of lading for the transportation of a lot of household goods tendered to its agent at Charlotte, N. C., on September 17, 1907, to be carried to Davis, West Virginia, a point on a branch of the Western Maryland Railroad. The agreed facts will be found in the Transcript at pp. 12-16. The goods were tendered by Etta C. Reid, one of the plaintiffs, and a prepaid bill of lading demanded. Defendant's agent informed her, in accordance with the facts, that there was no established rate for such shipments, that no rate had been filed and published. On September 17 the agent wired the division freight agent, who took up with the connecting carriers the establishment

of a through rate on household goods from Charlotte, N. C., to Davis, W. Va., such rate was established, and the agent at Charlotte was duly informed thereof on September 23 and on that date issued a bill of lading for the shipment.

The opinion of the North Caroline Supreme Court, affirming the judgment of the lower court, and the dissenting opinion of two of the five judges, will be found in 69 Southeastern Reporter at page 618; see Trans., pp. 25, 29. Judges Brown and Walker dissented, on the ground that the statute as applied to interstate shipments is invalid. The court referred to previous decisions holding that "refusing to receive for shipment is an act wholly done within this State, is not a part of the act of transportation, and our penalty act applies;" and also declared that there is a common-law duty to accept freight "whenever tendered."

The carrier contended that it could not lawfully transport the freight, since the rates had not been established, as required by act of Congress, but the court declared that "the Federal statute (section 6) does not prohibit the receipt or forwarding of a single shipment, but forbids the carrier to 'engage or participate in the transportation of passengers and property,' interstate, without filing its rates;" that "it is the *business* of a common carrier, which the defendant is forbidden to exercise without filing its rates."

The court continued:

> "If, however, the defendant was in default in not having complied with the Federal statute to establish and post its rates, this would not be a defense to its other default in failing to comply with its common-law duty to receive all freight when tendered, under penalty prescribed by a State statute." Transcript, p. 28.

The statute, then, as construed by the Supreme Court of the State, imposes a penalty upon the carrier for refusing to receive for transportation and issue a bill of lading for a shipment which it is forbidden, on account of no rate having been filed with the Interstate Commerce Commission, from transporting in interstate commerce.

Is the James Case or the Mayes Case the Analogy to be Applied?

Having pointed out the construction which has been put upon section 2631 by the highest court of the State by actual decision, as distinguished from *obiter dicta*, the Court is asked to consider whether the statute is like the Georgia statute upheld in the James case or like the Texas statute condemned in the Mayes case.

The common-law duty of the carrier in respect to the receiving of goods for transportation is to receive them "upon reasonable request therefor" (see Hannibal & C. R. Co. *vs.* Swift, 12 Wall., 262, 270), and this is likewise the national policy in re-

spect to the regulation of interstate commerce, as shown by the language of the Interstate Commerce Act, section 1.

We submit that this principle of the common law is denied by the North Carolina statute here under consideration, as construed in these very cases by the Supreme Court of North Carolina; that court holding in the Reid and Beam case that the statute requires the acceptance by the carrier of the goods and the issuance of a bill of lading therefor, although the shipper gives for the point of destination an incorrect name, although the goods are destined to a point on the line of an independently operated carrier which is a mere industrial siding and where there is neither depot nor agent, to which there was no published through rate and to which no shipment had ever been carried by a railroad, and that the goods must be accepted under these circumstances by the carrier without allowing any time for inquiry as to the point of destination and without allowing any time for the establishment and publication of through rates, and in a case where the tender was to prepay the freight; and holding in the Reid & Reid case that the statute of the State required the acceptance by the carrier of the shipment for a point on the line of another carrier, although there was no established rate for such shipment and although the Interstate Commerce Act prohibited the acceptance and carrying of the shipment except at rates duly filed and published as required

by that law. A similar situation is presented by the Burlington Lumber Co. case, *supra.*

We also submit that the benefit of the common-law rule that goods shall be received for transportation "upon reasonable request therefor" is denied by the North Carolina statute as construed and applied in the Garrison case, *supra,* and in the Wampum Cotton Mills case, *supra.* It is universally recognized that the carrier has a right to refuse to receive goods for transportation in a situation not created by its own default where it is unable to effect the transportation and delivery of such goods owing to the congestion of its facilities or to an embargo laid by a connecting carrier on account of congestion on the latter's lines. In such a case receipt of the goods for transportation would simply further congest the facilities of the carriers to the detriment of the interests of the public and of commerce, intrastate and interstate, without rendering any benefit to any one. Nevertheless, in the Garrison case, as we have seen, the statute was so construed as to permit the imposition of penalties upon the carrier for its refusal to receive a shipment consigned to a consignee who was unable to accept delivery of cars which had already been placed for delivery to him, and who had thus caused a congestion of the carrier's equipment and facilities in its yards at destination; while, in the Wampum Cotton Mills case, the statute was construed so as to penalize the carrier for refusal to receive goods consigned to a firm

against which the defendant carrier's connection had placed an embargo under circumstances similar to those existing in the Garrison case.

In the James case the statute applied to telegraph companies. Such companies hold themselves out as carrying but one thing, viz., intelligence, and the ascertainment of the correct rate for the service is a simple matter. Railroad companies, on the other hand, carry a vast number of different articles, to which various rates apply, and the ascertainment of the correct rate on a particular shipment is often a complex matter. Telegraph companies, as a rule, carry from origin to destination over their own lines, whereas interstate shipments carried by railroads usually pass over more than one and often numerous lines. A telegraph message has no inherent value and imposes no responsibility upon the telegraph company other than for its transmission to and delivery at destination. The measure of damages in the case of a delayed telegram is frequently difficult of ascertainment, dependent as it often is upon mental suffering, which cannot be accurately computed by a jury. On the other hand, shipments of freight over a railroad impose upon the carrier responsibility for their safety, and in case of delay the loss to the shipper is readily ascertained. It is also true that the receipt of telegrams by a telegraph company, under circumstances where its facilities are inadequate for the business on hand and offered, does not create congestion in the same de-

gree as is the case under similar circumstances when cars of freight are required to be received by a railroad company. These radical differences between the situation of a telegraph company and that of a railroad company should be borne in mind in determining the practical effect of statutes requiring the receipt in the one case of telegrams for transmission and in the other of freight for transportation.

The Georgia statute in the James case provided that the telegraph company should, during the usual office hours, receive dispatches and, on payment of the usual charges, "transmit and deliver the same with impartiality and good faith and with due diligence under penalty of one hundred dollars." The only absolute requirement in the statute is that the telegram shall be received. As above suggested, there is no responsibility upon the telegraph company arising out of any inherent value of the message nor any difficulty as to ascertaining the correct rate. The requirement of the statute as to transmission and delivery is not rigid. It is only necessary for the telegraph company under the terms of the statute to exercise impartiality, good faith, and due diligence, these requirements being as flexible as the common law. The difficulty of proving damages in case of delay makes it proper that there should be a definite amount fixed as a penalty for negligence. There is but one penalty in the case of each telegram tendered for transmission. The penalty does not in-

crease day after day indefinitely, as does the penalty prescribed by section 2631 of the North Carolina code.

In the James case the court declares (p. 662):

> "We do not mean to be understood as holding that any State law on this subject would be valid, even in the absence of Congressional legislation, if the penalty provided were so grossly excessive that the necessary operation of such legislation would be to impede interstate commerce. Our decision in this case would form no precedent for holding valid such legislation. It might then be urged that legislation of that character was not in aid of commerce, but was of a nature well calculated to harass and impede it. While the penalty in the present statute is quite ample for a mere neglect to deliver in some cases, we cannot say that it is so unreasonable as to be outside of and beyond the jurisdiction of the State to enact."

Mr. Justice Shiras and Mr. Justice White dissented, referring to the Pendleton case, 122 U. S., 347.

Does it not seem apparent from this language of the court that a statute prescribing a penalty of $50 per day, with no time limit to the accumulation of such daily penalties, imposed upon a carrier for its refusal to receive and issue a bill of lading for freight tendered to it for transportation, in view of the considerations above mentioned completely differentiating a railroad company from a tele-

graph company, beginning to accrue on the very date when the shipment is tendered, and imposed, although the carrier may be unable, through no fault on its part, immediately to ascertain the point of destination or to find the error in erroneous shipping instructions or to make delivery of the shipment, although no rate to destination may have been established, although, even when such rate has been established, the agent of the carrier cannot immediately ascertain such rate—is it not apparent, we say, having in view the complexity of the operations of a great railroad company and the numerous agents it must employ, that the application of the principles laid down in the James case invalidates this North Carolina statute as applied to interstate commerce?

On the other hand, are there any salient considerations leading to the upholding of this North Carolina statute which would differentiate this statute from the Texas statute condemned in the Mayes case? In that case the statute was tested by the determination of whether its provisions, not as a matter of theory but in the light of the practical administration thereof, would regulate or impose a burden upon interstate commerce. The carrier was required by the common law to furnish cars within a reasonable time. The statute provided that the cars should be furnished within a reasonable time, and defined such reasonable time as "not exceeding six days," with the proviso that in case of the application for ten cars or less they

should be furnished within three days, and that if the application should be for fifty cars or more the railway company might have ten full days in which to supply the cars. The statute also contained provisions safeguarding the railroad company against imposition, to the effect that if the applicant should not use the cars he should forfeit a penalty, that the application must be in writing, and that the place designated for the placing of the cars should be at some station or switch on the railroad. It also provided that it should not apply in case of strikes or other public calamities.

The North Carolina statute imposes a penalty for the refusal to receive freight "whenever tendered," and imposes a penalty of $50 for the first day's delay, and the same amount for each succeeding day *ad infinitum*. It is supplemented by another statute (*subjoined) imposing heavy pen-

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* *Failure to transport in reasonable time; reasonable time defined; forfeiture.*—It shall be unlawful for any railroad company, steamboat company, express company or other transportation company doing business in this State to omit or neglect to transport within a reasonable time any goods, merchandise or articles of value received by it for shipment and billed to or from any place in the State of North Carolina, unless otherwise agreed upon between the company and the shipper or unless same be burned, stolen or otherwise destroyed, or unless otherwise provided by the North Carolina corporation commission. Each and every company violating any of the provisions of this section shall forfeit to the party aggrieved the sum of fifteen dollars for the first day and two dollars for each succeeding delay of unlawful detention or neglect where such shipment is made in carload lots, and in less quantities there shall be a forfeiture in like manner of ten dollars for the first day and one dollar for each succeeding day: *Provided*, The forfeiture shall not be collected for a period exceeding thirty days. In reckoning what is reasonable time for such transportation it shall be considered that

alties in case the railroad company shall not promptly start and continue to transport the freight after it is received. As construed by the North Carolina court, *the inability of the railroad company to deliver in no way excuses it from the necessity of receiving for transportation.*

It will not do to seek to uphold this statute by referring to the dicta of the North Carolina Supreme Court to the effect that it will relieve from the penalties in cases which appeal to its sense of justice and clemency. This is especially true in view of the actual decisions by that court in these and other cases where perfectly reasonable common-law excuses for non-receipt of shipments are under the statute disapproved and disallowed.

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such transportation company has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping stations; and a delay of two days at the initial point and forty-eight hours at one intermediate point for each hundred miles of distance or fraction thereof over which said freight is to be transported shall not be charged against such transportation company as unreasonable and shall be held to be *prima facie* reasonable, and a failure to transport within such time shall be held *prima facie* unreasonable. This section shall not be construed to refer only to delay in starting the freight from the station where it is received, but in addition thereto shall be construed to require the delivery at its destination within the time specified: *Provided, however,* That if said delay shall be due to causes which could not in the exercise of ordinary care have been foreseen, and which were unavoidable, upon establishment of these facts to the satisfaction of the justice of the peace or jury trying the cause, the defendant transportation company shall be relieved and discharged from any penalty for delay in the transportation of freight, but it shall not be relieved from the costs of such action. In all actions brought under this section the burden of proof shall be upon the transportation company to show where the delay, if any, occurred.

North Carolina Revisal of 1905, section 2682.

It is not possible for the carrier to know in advance whether the case is such that the penalty will not be imposed by the trial court or will be remitted by the appellate court. It cannot regulate its action by reference to standards of conduct which are in any degree definitely prescribed by law. Being placed in this situation it must for its self-protection undertake at all hazards to avoid the risk of the accrual of penalties under the statute, regardless of the consequences to the movement of interstate and other commerce. This being true, the relief which may be thereafter granted by the court cannot retroact so as to nullify the burden which has already been placed upon interstate commerce. If this is a government of laws and not of men, as has been frequently declared by this Court, the statute cannot be saved from invalidity by the exercise or by the promised exercise by the judicial department of the State of a power analogous to the pardoning power vested in the executive.

We deem it unnecessary in this connection to refer to other decisions of this Court, such as that in the case of Western Union Tel. Co. *vs.* Crovo, 220 U. S., 364, since it is believed that the James case and the Mayes case are thoroughly representative of the two lines of cases referred to on a prior page of this brief (*supra,* p. 7), and contain all the principles which have been applied in other similar cases.

II.

The Statute is Unconstitutional in that it Conflicts with Acts of Congress Regulating Interstate Commerce.

The Reid and Beam case, No. 80, involves matters which took place between July 2 and July 18, 1906, after the Hepburn Act of June 29, 1906, was passed and approved, and after the national policy had therefore been expressly declared, but before it became effective. The Reid and Reid case, No. 487, involves matters which took place in September, 1907, after the Hepburn Act became effective.

Before the Hepburn Act was Passed.

We desire now to discuss the validity of the North Carolina statute as applied to the alleged cause of action in the Reid and Beam case, in the light of the state of the Federal law regulating interstate commerce as it was before the passage of the Hepburn Act.

Section 1 provided:

> "That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, manage-

ment, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

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"All charges for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section 3, paragraph 1, was as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 6 required every common carrier subject to the act to print and keep open to public inspection schedules showing its rates for the transportation of property, and required the filing with the Commission of a copy of such schedule, whether separately or jointly established, and further provided that it should be unlawful for such common carrier to charge, demand, collect, or receive a greater or less compensation for the transportation of property or for any services in connection therewith than was specified in such published schedule of rates then in force, and unlawful for any such common carrier, party to a joint tariff, to charge, demand, collect or receive a greater or less compensation for the transportation of property, or for any services in connection therewith, between points as to which a joint rate was named thereon, than was specified in the schedule filed with the Commission in force at the time.

Said section further provided that a carrier neglecting or refusing to file or publish its schedules of rates should, in addition to the other penalties prescribed in the act, be subject to mandamus in the proper federal court and that the Commissioners might also apply for a writ of injunction in such court against such common carrier, to restrain it from receiving or transporting property interstate until it should have complied with the provisions as to publishing and filing its rates.

Also, the act of Congress, approved February 19, 1903, known as the Elkins Act, made it a criminal offense for the carrier willfully to fail to file and publish its tariffs of rates as required by the Act to Regulate Commerce or "strictly to observe such tariffs until changed according to law."

Section 13, paragraph 1, provided:

> "That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a rea-

sonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Section 14, paragraph 1, provided:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found."

We contend that by the enactment of the above provisions Congress has actually assumed control of the matter of the receipt of goods tendered for interstate transportation. An illustration will make our position clear.

Suppose a North Carolina shipper who is en-

gaged in sending goods to market in other States feels that the carrier is subjecting him to an unreasonable prejudice in that it promptly receives for transportation the goods of his competitor while refusing to receive and issue bills of lading for his shipments promptly, making various excuses for its conduct. Such shipper, resolving to put a stop to the discrimination, brings action in the State court for the recovery of the penalties and damages provided by section 2631. At the same time he files a complaint with the Interstate Commerce Commission, under section 13 of the Act to Regulate Commerce, alleging a violation of section 3 of the Act, and asking reparation for the injury inflicted upon him by the undue discrimination of the carrier, quoad the very acts and occurrences upon which the action in the State court is based. Now, suppose the State courts construe section 2631 as applying to the case, hold that the matters alleged by the carrier in justification of its conduct are not things which furnish lawful excuses under said section, and that the carrier is liable to penalties and damages under the statute. At the same time the Commission reaches the conclusion that there has been no undue discrimination against the complainant; that there was no legal duty upon the carrier under the provisions of the Act to receive the goods any sooner than it did receive them, in view of the circumstances of the case (*e. g.*, an embargo upon shipments to the particular consignee to whom complainant's goods

were to be shipped). Accordingly, finding no discrimination, the Commission refuses reparation and dismisses the complaint. Here we have a case where the body created and given power over the subject-matter by Congress determines that the carrier has done its duty with respect to the matters of interstate commerce involved, yet the intention of Congress is completely frustrated by the enforcement of the State statute applying to the same subject-matter. Illustrations might be multiplied, but we take it that the one given is sufficient. The State law and the Federal law apply to the same subject-matter and conflicts must necessarily occur between the operation of the Federal law, the enforcement of which is entrusted by Congress to the Commission and to the Federal courts (in which reparation orders of the Commission are enforced) on the one hand, and the operation of the State law, as administered by the State courts, on the other. Which shall prevail?

Would not the conflict and confusion necessarily resulting from the administration of the State law by the State courts and the Federal law by the Federal tribunals as to the same subject matter so deplored by this Court in Texas, etc., R. Co. *vs.* Abilene Cotton Oil Co., 204 U. S., 426, 440, be inherent in the situation here referred to?

See also Baltimore, etc., R. Co. *vs.* Pitcairn Coal Co., 215 U. S., 481.

Attention is also called to section 23 of the Act (which was not altered by the Hepburn Act):

"That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to *move and transport the traffic*, or to *furnish cars or other facilities* for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."

(Act of March 2, 1889.)

It may be in a particular case that the awarding of a mandamus by the federal court would be inconsistent with the power conferred upon the Com-

mission in other sections of the Act under the doctrine of the Abilene case, which arose before the passage of the Hepburn Act. See page 498 of the opinion in the Pitcairn case, which arose in 1907. The court, however, declares in the latter case that "there is ample scope for giving effect to and applying the remedy embraced in section 23, if that section be construed in harmony with the act of which it forms a part" (p. 498), and indicates that even since the passage of the Hepburn Act the section authorizes the issuance of a mandamus to compel "the performance of duties which are so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body" (p. 499), or to require "the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts" (p. 500).

However, then, the power of the federal courts to award the writ of mandamus under section 23 may be circumscribed by the jurisdiction of the Commission over the subject-matter, it cannot be questioned that one body or the other, the federal court or the Commission, has primary jurisdiction to require the carrier "to move and transport the traffic, or to furnish cars or other facilities for transportation," where interstate commerce is involved. Suppose, then, that a North Carolina

shipper brings action for the penalties and damages prescribed by section 2631 for failure to receive interstate freight for transportation and at the same time applies to the Commission for an order requiring the furnishing of facilities for the transportation and compelling the movement of the traffic tendered, or resorts to the federal court praying for a mandamus. The conclusions as to the duty of the carrier under the State statute reached by the State court may be entirely inconsistent with the conclusion of the federal tribunal as to the duty of the carrier under the acts of Congress regulating interstate commerce. Which shall prevail—the State statute or the Federal laws?

We submit that there is nothing in the decision of this court in Missouri Pacific Ry. *vs.* Larabee Flour Mills, 211 U. S., 612, which weakens the force of our position. In that case a controversy arose between the carrier and the mills company over certain demurrage charges which the mills company refused to pay, and the carrier refused to make further delivery to the mills company of empty cars upon the transfer track, its refusal being "based solely upon the ground above stated, and not upon a claim that the compensation paid for the service was unsatisfactory, or that the service constituted a part of interstate commerce, or that the Missouri Pacific did not undertake to perform services of such character" (p. 615). This Court held, Mr. Justice Brewer delivering the opin-

ion, that there was no error in the judgment of the Supreme Court of Kansas awarding a mandamus commanding the carrier to resume the transfer and placing of cars for the mills, declaring that the carrier was bound to treat all industries alike, and that this duty arose from the fact that it was a common carrier, and lay at the foundation of the law of carriers, irrespective of legislative action or special mandate. It was claimed by the carrier that Congress had already acted on the subject, in that it had created the Interstate Commerce Commission and given to it a large measure of control over interstate commerce, but the court held that the fact that Congress had entrusted power to the Commission did not, in the absence of action by it, prevent the State court from awarding a mandamus in the enforcement of a plain common-law duty. Mr. Justice Holmes concurred, on the ground that the cars had not been appropriated to interstate commerce, while Mr. Justice Moody and Mr. Justice White dissented, on the ground that the action of the State court was inconsistent with the power conferred upon Congress by the Commerce Clause of the Constitution and the authority conferred upon the Commission by Congress in the Act to Regulate Commerce.

In the present case there is no question involved as to whether the provisions of the acts of Congress and the power of the Interstate Commerce Commission conferred by those acts prevent the state from enforcing the plain common-law obligations

which the common carrier assumes in accepting its charter and engaging in business as such. On the contrary, the question is one of the power of the state legislature to enact a statute covering in part a field and operating upon a subject-matter over which Congress has taken control and which it has regulated by imposing affirmative duties upon the carrier and entrusting the matter of compelling the performance of those duties to the federal tribunals. The state court has jurisdiction arising out of authority conferred by the State to enforce the legal obligations of the carrier, whether arising out of common law, valid State legislation, or federal legislation, so far as its powers are not circumscribed by the operation of federal laws. The state legislature, on the other hand, when Congress has under the provisions of the federal Constitution taken control of a given field or subject-matter, is powerless to invade that field, although if it should do so the enforcement of the legislation in the state court might not actually conflict with the federal law.

The attention of the Court is directed also to the provisions of section 6 of the Act requiring the filing and publishing of rates, prohibiting the charging or receiving of a greater or less rate than that published or filed, and prescribing mandamus in the United States court to compel the carrier to publish and file its rates, and injunction in such federal court to restrain the carrier "from *receiving* or transporting" interstate shipments

when it has failed so to file and publish its rates.

These provisions are a declaration of the policy of Congress (as clearly as if announced in so many words, as it is in section 2 of the Hepburn Act, hereinafter referred to, p. 63) that the carrier shall not receive interstate shipments for transportation where its rates applying thereto have not been published and filed as required by the Act. Indeed, the authorization of an injunction restraining the carrier from receiving or transporting interstate shipments when it has failed to file and publish its rates is equivalent to an express prohibition against the receipt and transportation of freight except at rates and upon terms prescribed in the published tariffs. Can the State, in view of this regulation of the subject by Congress, validly enact legislation requiring interstate freight to be received "whenever tendered," regardless of the situation with respect to the publication and filing of the rates?

AFTER THE HEPBURN ACT BECAME EFFECTIVE.

Section 1, paragraph 2, of the Act to Regulate Commerce as amended by the Hepburn Act of June 29, 1906, provided in part:

> "The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with

> the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor."

Section 3 of the Act was not affected by the Hepburn Act.

Section 2 of the Hepburn Act, amending section 6 of the Act, in addition to requiring the filing and publishing of rates, as had been required before the passage of the amendment, and adding provisions with respect to the matter of filing and publishing such rates, provided that no carrier—

> "shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act."

Section 15, as amended by the Hepburn Act, authorizes and requires the Commission, whenever, after full hearing, it shall be of opinion that—

> "any regulations or practices whatsoever of such carrier or carriers affecting such rates are unjust and unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe * * * what regulation or

practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, * * * and shall conform to the regulation or practice so prescribed."

Said section also provides that all orders of the Commission except orders for the payment of money shall take effect without the sanction of previous judicial authority, and to enforce these provisions penalties and forfeitures are provided in section 16.

The Hepburn Act also added certain new paragraphs to section 20, among which was the following:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State *shall issue a receipt or bill of lading therefor* and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

In addition, then, to the provisions above referred to in connection with the consideration of the state of the federal law before the passage of the Hepburn Act, we now have these new regulations by which Congress has expressly taken more complete control of the business of interstate transportation.

Congress declares that transportation shall be furnished "upon reasonable request therefor," and defines transportation as including the cars and other instrumentalities and facilities of interstate shipment and carriage, and "all services in connection with the *receipt*, delivery, * * * and handling of property transported."

The State statute requires the carrier to receive freight "whenever tendered."

The Supreme Court of the State has construed the statute, as we have seen, as imposing a penalty, though the receipt for transportation of the freight tendered would inevitably result in the congestion of the carrier's facilities; though the carrier might be powerless to transport the freight on account of an embargo created by a connecting carrier; though the receipt and transportation of the property might involve a violation of section 6 of the federal act. Even if the statute should be construed to impose the same affirmative duties upon the carrier as are prescribed by Congress in the "reasonable request" clause, the state statute would be invalid as invading the field of which Congress has taken control, and that, too, in a mat-

ter of national scope and importance, admitting of but one uniform system of regulation.

Cooley *vs.* Board of Wardens, 12 How., 299.
County of Mobile *vs.* Kimball, 102 U. S., 691.
Wabash Railway Co. *vs.* Illinois, 108 U. S., 573.
McLean *vs.* Denver, etc., R. Co., 203 U. S., 38.
Oklahoma *vs.* Kansas National Gas Co., 221 U. S., 229.

But it is not necessary for us in the cases at bar to rely upon these principles, for it is apparent that the North Carolina statute, construed by the Supreme Court of the State in the way hereinbefore referred to, imposes upon the carrier in the matter of receiving freight for transportation much more rigorous and unbending obligations than are imposed by the congressional rule of furnishing transportation "upon reasonable request." The respective rules of Congress and of the State are thoroughly inconsistent. Not only is it apparent that there are necessary conflicts in the matter of the substantive regulations of the State and the federal statutes, respectively, but, even if substantive matters were regulated in identically the same manner, there would inevitably be conflicts in the administration of the State and of the federal laws. Not only is this true, but the remedies of the party

aggrieved are entirely different in the two codes of law.

Attention is also called to the provisions of section 2 of the Hepburn Act (amending section 6 of the Act as amended) where the carrier is expressly forbidden to engage in the transportation (defined in section 1 to include "all services in connection with the *receipt* * * * of property transported") of property unless it has filed and published its rates as required in the Act. In the face of this prohibition by Congress, can the State validly declare that interstate freight shall be *received* "whenever tendered," irrespective of whether the carrier has or has not complied with the condition precedent expressly imposed by Congress? Congress says to the carrier which has not published and filed the rates: "Thou shalt not receive;" the State commands: "Thou shalt receive." Which shall the carrier obey?

The Court is also asked to consider the provisions of the so-called Carmack Amendment, which was added to section 20 of the Act to Regulate Commerce by the Hepburn Act of 1906. In that amendment Congress in express words regulates the duty of the carrier in the matter of issuing receipts or bills of lading for freight tendered for interstate transportation, and the operation of the State law is thereby excluded.

It is, therefore, respectfully submitted that, from whatever standpoint the North Carolina statute

be considered, it amounts to an attempted regulation of interstate commerce, and is, therefore, unconstitutional and void.

JOHN K. GRAVES,
Attorney for Plaintiff in Error.

ALFRED P. THOM,
Counsel.

NOVEMBER, 1911.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 80.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

C. C. REID AND EDWARD BEAM, COPARTNERS UNDER THE FIRM NAME OF REID & BEAM, DEFENDANTS IN ERROR.

No. 487.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

D. L. REID AND WIFE, ETTA C. REID,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF FOR DEFENDANTS IN ERROR, D. L. REID AND WIFE, ETTA C. REID.

PLUMMER STEWART,
JNO. A. McRAE,
Attorneys for Defendants in Error,
D. L. Reid and Wife, Etta C. Reid.

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ARGUMENT.

Section 2131 *of the North Carolina Revisal of* 1905, *penalizing common carriers for refusing to accept freight for shipment, is in the aid of com-*

merce and not a restraint upon it, and is, therefore, a valid exercise of the State's power.

A. C. L. Ry. Co. *vs.* Muzursky, 216 U. S., 122.

Western Union Telegraph Company *vs.* James, 162 U. S., 650.

State enactments of the following nature have been declared valid by this court:

Requiring engineers to be examined with respect to their ability to distinguish color (R. R. *vs.* Ala., 128 U. S., 96); requiring telegraph companies to receive dispatches, to transmit and deliver them with due diligence, as applied to messages outside of the State (James *vs.* Telegraph Co., *supra*); forbidding running freight trains on Sunday (Hennington *vs.* Georgia, 163 U. S., 299); requiring railway companies to fix their rates annually for the transmission of passengers and freight, and to post a printed copy at stations (R. R. *vs.* Fuller, 17 Wallace, 560); regulating the heating of passenger cars and directing guards and guardposts to be placed on bridges and trestles (R. R. *vs.* N. Y., 165 U. S., 628).

It can be easily seen that interstate shippers will get better service with statutes like the one in question than without.

Freight must be shipped or started on its way before it becomes interstate commerce.

Coe *vs.* Errol, 116 U. S., 517.

In re Daniel Ball, 10 Wallace, 565.

Match Company *vs.* Ontonagon, 188 U. S., 94.

Under the agreed statement of facts, page 15 of the record, Etta C. Reid's actual damages, outside of penalty, was $25.00. In any event she is entitled to recover this.

Statute is not unconstitutional in that it conflicts with the act of Congress regulating interstate commerce.

In the second branch of his argument the able attorney for the plaintiff in error says that the defendant could not receive the freight in question for shipment until the rate of freight to be charged for transportation had been filed with the Interstate Commerce Commission, published according to law, etc., and that such act would have made plaintiff in error guilty of a misdemeanor. We ask to differ from this conclusion. There is found in the Interstate Commerce Act substantially the words referred to in brief of attorney for plaintiff in error, but among other things, section 6 of the act referred to reads as follows, to wit:

> "That every common carrier subject to the provisions of this act shall file with the

> Commission created by this act, print and keep open to public inspection, schedules showing all the rates, fares, charges for transportation between different points on its own route and between points on the route of any other carrier by railroad, by pipe line or by water, *when a through route and joint rate have been established.*"

The paragraph referred to above must be read in connection with the provision just quoted. The rates are to be filed when they have been established. Under the agreed facts in this case the joint rates between the points in question had not been established. The plaintiff in error, therefore, would not have been guilty of a misdemeanor in accepting the freight.

The proposition is again advanced, that had the bill of lading been issued from Charlotte, North Carolina, to Davis, West Virginia, then under the laws of the United States regulating United States commerce, the plaintiff in error would have been liable for any negligence of the Western Maryland Railroad Company in connection with the freight in question. That is true. But the plaintiff in error did issue the bill of lading on the 23d day of September, 1907, and it was likewise liable, if the goods were lost in transportation, and therefore, the question raised is not properly before the court. This provision of the Federal Statute was intended to facilitate the collection of claims for

damage or by loss of freight. The same section of the law also provides—

> "That a common carrier * * * issuing such receipt or bill of lading shall be entitled to recover from the common carrier * * * on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury as may be required to pay to the owners of such property as may be evidenced by any receipt, judgment or transcript thereof."

When the plaintiff in error refused on the 17th day of September to receive the freight in question for shipment, it did not set up the excuse that it would be liable for any negligence of the connecting carrier, but solely the objection that it did not know the freight rates. Then why, at this late day, should it be allowed to come in and substitute some other reason or excuse for its failure to perform its common-law duty? When the destination is on the line of a receiving carrier, it is the duty of such carrier to receive, transport and deliver within a reasonable time and for reasonable compensation; when the destination is upon the line of the connecting carrier, it is the duty of the initial carrier to receive, transport and deliver to the connecting carrier. The bill of lading under which the shipment in question was carried recognizes this. Section 2 is as follows, to wit:

> "No carrier is bound to carry said property by any particular train, or vessel, or in

time for any particular market or otherwise, than what is reasonable dispatch as its general business will permit. Every carrier shall have the right in case of necessity to forward said property by any carrier between the point of shipment and the point to which the rate is given. All additional risk and increased expenses incurred by reason of change of route in case of necessity shall be borne by the owner of the goods and be a lien thereon."

The *feme* defendant in error in the case of Reid and Reid did not demand that she be allowed to prepay the freight—she only offered to do so. The freight could have been accepted for shipment and shipped and the final carrier could have collected the charges by a sale of the property, if necessary for the purpose. Why should the public be inconvenienced by any such rules of conducting its business as the common carrier insists upon in this particular case? In the Reid & Reid case the carrier did receive the freight on the 23d of September—why could it not have received it on the 17th? The through and joint rate from the lines of the several common carriers between Charlotte, North Carolina and Davis, West Virginia, had not been published and filed with the Interstate Commerce Commission on the 23d of September, when the common carrier did receive the shipment.

We submit that upon all the facts and the law applicable thereto, that the defendants in error in the case of D. L. Reid and wife, Etta C. Reid, were

entitled to a penalty of $50.00 for 5 days, and actual damages in the sum of $25.00, making a total of $275.00, as awarded by the courts of the State of North Carolina.

PLUMMER STEWART,
JNO. A. McRAE,
Attorneys for Defendants in Error,
D. L. Reid and Wife, Etta C. Reid.

SOUTHERN RAILWAY COMPANY *v.* REID.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 487. Argued December 6, 1911.—Decided January 9, 1912.

There are three degrees to which the State exercises power over commerce. First exclusively; second, in the absence of legislation by Congress, until Congress does act; third, where Congress having legislated, the power of the State cannot operate at all.

Although when Congress is silent, the State may legislate in aid of, or

without burdening, interstate commerce, there may at any time be Federal exertion of authority which takes that power from the State.

Although where Congress and the State have concurrent power, that of the State is superseded when the power of Congress is exercised, the action of Congress must be specific in order to be paramount. *Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612.

By the specific provisions of the act to regulate commerce, as amended, Congress has taken control of rate making and charging for interstate shipments, and in that respect such provisions supersede state statutes on the same subject; and so *held* that a statute of North Carolina requiring common carriers to transport freight as soon as received to interstate points under penalties for failure, conflicts with the requirement of § 2 of the Hepburn Act of July 29, 1906, c. 3591, 34 Stat. 584, forbidding transportation until rates had been fixed and published, and is therefore unenforceable.

As between the Federal Government and the States one authority must be paramount and when it speaks the other must be silent.

No essential power is taken from the States in preserving the balances of the Constitution and giving to Congress the power which belongs to it.

Any middle ground on which state authority might still be preserved after Congress has spoken in regard to interstate commerce is passed when the state regulation burdens such commerce, and the imposition of penalties for failure to receive and transport freight does impose a burden.

Quære whether conceding that a State may impose a penalty does not concede the State to be competent to determine the amount.

153 N. Car. 490, reversed.

THE facts, which involve the validity of a statute of North Carolina affecting common carriers, are stated in the opinion.

Mr. Alfred P. Thom, with whom *Mr. John K. Graves* was on the brief, for plaintiff in error in this case and in No. 80 argued simultaneously herewith (see p. 444, *post*):

The statute contravenes the commerce clause of the Constitution because it seeks to regulate, and if enforced, will impose a burden upon, interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 210; *Gloucester Ferry Co.* v.

Pennsylvania, 114 U. S. 204; *Atl. Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186. See also cases showing where the line is to be drawn in which state statutes were upheld: *West. Un. Tel. Co.* v. *James*, 162 U. S. 650; *Richmond &c. R. R. Co.* v. *Patterson Co.*, 169 U. S. 311; *Atl. Coast Line R. R. Co.* v. *Mazursky*, 216 U. S. 122; *West. Un. Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406; *West. Un. Tel. Co.* v. *Crovo*, 220 U. S. 364; and in which state statutes, or orders of state commissions were condemned: *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347; *Central of Geo. Ry. Co.* v. *Murphey*, 196 U. S. 194; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Houston &c. R. R. Co.* v. *Mayes*, 201 U. S. 321; *St. Louis &c. R. R. Co.* v. *Arkansas*, 217 U. S. 136.

The question is whether the statute is constitutional as applied to interstate commerce, not whether the imposition of the penalties in these particular cases might have been constitutionally authorized.

One upon whom a penalty has been imposed under the provisions of a statute has an interest which has suffered, and is entitled to challenge the validity of the statute as applied to all cases within its operation. *United States* v. *Reese*, 92 U. S. 214, 222.

The statute is not merely in aid of a common law duty, but is regulating interstate commerce. It rigidly requires the carrier to receive freight whenever tendered. No exception is made for any cause or under any circumstances whatever. *Alsop* v. *Express Co.*, 104 N. Car. 278; *Garrison* v. *Southern Ry. Co.*, 150 N. Car. 575; *Wampum Cotton Mills* v. *Carolina &c. R. R. Co.*, 150 N. Car. 608; *Burlington Lumber Co.* v. *Southern Railway Co.*, 152 N. Car. 70.

The penalties began to accrue immediately upon the refusal to receive; not from the time the rates could be ascertained in the exercise of due diligence.

No duty at common law rests upon a carrier, in the

absence of contract or custom, either to receive freight at or deliver to an industrial siding or non-agency station. Hutchinson on Carriers (3d ed.), § 122; *Louisville &c. R. R. Co.* v. *Flanagan*, 113 Indiana, 488; *Charnock* v. *Tex. & Pac. R. R. Co.*, 194 U. S. 436; *Kellogg* v. *Railway Co.*, 100 N. Car. 158; *Land* v. *Railway Co.*, 104 N. Car. 48.

If there is no duty, in the absence of contract or custom, to receive freight tendered at a non-agency station, it follows that no common law duty rests on the carrier to deliver at or to accept shipments for delivery at such a point.

The statute, as construed by the Supreme Court of the State, imposes a penalty upon the carrier for refusing to receive for transportation, and issue a bill of lading for, a shipment which it is forbidden, on account of no rate having been filed with the Interstate Commerce Commission, from transporting in interstate commerce.

The North Carolina statute imposes a penalty for the refusal to receive freight "whenever tendered" and imposes a penalty of $50 for the first day's delay, and the same amount for each succeeding day *ad infinitum*. It is supplemented by another statute imposing heavy penalties in case the railroad company shall not promptly start and continue to transport the freight after it is received. As construed by the North Carolina court, the inability of the railroad company to deliver in no way excuses it from the necessity of receiving for transportation.

Being placed in this situation it must for its self-protection undertake at all hazards to avoid the risk of the accrual of penalties under the statute, regardless of the consequences to the movement of interstate and other commerce. This being true, any relief which may be thereafter granted by the court from a sense of justice or clemency cannot retroact so as to nullify the burden which has already been placed upon interstate commerce. If this

is a government of laws and not of men, as has been frequently declared by this court, the statute cannot be saved from invalidity by the exercise or by the promised exercise by the judicial department of the State of a power analogous to the pardoning power vested in the executive.

The statute is unconstitutional in that it conflicts with acts of Congress regulating interstate commerce.

No 80 involves matters which took place after the Hepburn Act of June 29, 1906, was passed and approved, and after the national policy had therefore been expressly declared, but before it became effective. No. 487 involves matters which took place after the Hepburn Act became effective.

By the enactment of the Commerce Act, Congress has actually assumed control of the matter of the receipt of goods tendered for interstate transportation.

Conflict and confusion necessarily result from the administration of the state law by the state courts and the Federal law by the Federal tribunals as to the same subject: *Texas &c. R. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; and see § 23 of the act, which was not altered by the Hepburn Act.

Mo. Pac. Ry. Co. v. *Larabee Mills*, 211 U. S. 612, does not affect this case.

After the passage of the Hepburn Act, under the new regulations of that act, Congress expressly took complete control of the business of interstate transportation. It declares that transportation shall be furnished "upon reasonable request therefor," while the state statute requires the carrier to receive freight "whenever tendered."

Even if the statute should be construed to impose the same affirmative duties upon the carrier as are prescribed by Congress in the "reasonable request" clause, the state statute would be invalid as invading the field of which Congress has taken control, and that, too, in a matter

of national scope and importance, admitting of but one uniform system of regulation. *Cooley* v. *Board of Wardens*, 12 How. 299; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Wabash Railway Co.* v. *Illinois*, 108 U. S. 573; *McLean* v. *Denver &c. R. R. Co.*, 203 U. S. 38; *Oklahoma* v. *Kansas Gas Co.*, 221 U. S. 229.

Under § 2 of the Hepburn Act the carrier is expressly forbidden to engage in the transportation, including the receipt, of property unless it has filed and published its rates as required in the act. In the face of this prohibition by Congress, the State cannot validly declare that interstate freight shall be received "whenever tendered," irrespective of whether the carrier has or has not complied with the condition precedent expressly imposed by Congress. Congress says to the carrier which has not published and filed the rates: "Thou shalt not receive"; the State commands: "Thou shalt receive." Which shall the carrier obey? See the provisions of the Carmack Amendment, added to § 20 by the Hepburn Act of 1906, in which Congress in express words regulates the duty of the carrier in the matter of issuing receipts or bills of lading for freight tendered for interstate transportation, and the operation of the state law is thereby excluded.

Mr. Plummer Stewart and *Mr. Jno. A. McRae* for defendants in error in this case and in No. 80 argued simultaneously herewith (see p. 444, *post*):

Section 2131 of the North Carolina Revisal of 1905, penalizing common carriers for refusing to accept freight for shipment, is in the aid of commerce and not a restraint upon it, and is, therefore, a valid exercise of the State's power. *Atl. Coast Line* v. *Mazursky*, 216 U. S. 122; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650.

State enactments of the following nature have been declared valid by this court:

Requiring engineers to be examined with respect to

their ability to distinguish color (*R. R. Co.* v. *Alabama*, 128 U. S. 96); requiring telegraph companies to receive dispatches, to transmit and deliver them with due diligence, as applied to messages outside of the State (*Telegraph Co.* v. *James, supra*); forbidding running freight trains on Sunday (*Hennington* v. *Georgia*, 163 U. S. 299); requiring railway companies to fix their rates annually for the transmission of passengers and freight, and to post a printed copy at stations (*Railroad Co.* v. *Fuller*, 17 Wall. 560); regulating the heating of passenger cars and directing guards and guard posts to be placed on bridges and trestles (*Railroad Co.* v. *New York*, 165 U. S. 628).

Interstate shippers will get better service with statutes like the one in question than without.

Freight must be shipped or started on its way before it becomes interstate commerce. *Coe* v. *Errol*, 116 U. S. 517; *The Daniel Ball*, 10 Wall. 565; *Match Co.* v. *Ontonagon*, 188 U. S. 94.

The statute is not unconstitutional in that it conflicts with the act of Congress regulating interstate commerce.

The defendant could have received the freight in question for shipment before the rate of freight to be charged for transportation had been filed with the Interstate Commerce Commission, published according to law, etc., without having been guilty of a misdemeanor.

Under § 6 of the act the rates are to be filed when they have been established. Under the agreed facts in this case the joint rates between the points in question had not been established.

The question of whether the carrier would have been liable for negligence of the connecting road, had it issued the bill of lading before a joint rate had been established, is not in this case or properly before the court.

When the carrier refused to receive the freight in question for shipment, it did not set up the excuse that it would be liable for any negligence of the connecting car-

rier, but solely the objection that it did not know the freight rates. At this late day, it cannot be allowed to come in and substitute some other reason or excuse for its failure to perform its common law duty. When the destination is on the line of a receiving carrier, it is the duty of such carrier to receive, transport and deliver within a reasonable time and for reasonable compensation; when the destination is upon the line of the connecting carrier, it is the duty of the initial carrier to receive, transport and deliver to the connecting carrier. The bill of lading under which the shipment in question was carried recognized this.

In No. 487 the shipper did not demand to be allowed to prepay the freight—she only offered to do so. The freight could have been accepted for shipment and shipped and the final carrier could have collected the charges by a sale of the property, if necessary for the purpose. The public would be inconvenienced by any such rules of conducting its business as the common carrier insists upon in this particular case.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in the case is the validity of an act of the State of North Carolina which requires the agents and officers of railroads and other transportation companies to receive freight for transportation whenever tendered at a regular station, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and forward the same by a route selected by the person tendering the same, under penalty of forfeiting $50 a day to the aggrieved party for each day of refusal to receive such freight and all damages actually sustained.[1]

[1] Agents or other officers of railroads and other transportation companies whose duty it is to receive freight shall receive all articles of the

Defendants in error brought suit against plaintiff in error, herein called the railway company, in one of the courts of North Carolina, to recover penalties and damages for the failure of the railway company, in violation of the statute, on dates from September 17 to September 23, 1907, to receive goods tendered to it by Etta C. Reid, defendant in error, at Charlotte, North Carolina, for transportation to a point in the State of West Virginia.

The material facts, as stipulated, are as follows: The railway company is a Virginia corporation, and is a common carrier, and operates a line of railroad from the city of Charlotte to the city of Alexandria, Virginia, and another line to the city of Richmond. Davis is a town in West Virginia, and a terminus of a branch road of the Western Maryland Railroad Company, six miles long, running from a point on the railroad, known as Thomas, to Davis.

The railway company operates no line of railroad or other means of conveyance to Davis, nor does it connect with the Western Maryland Railroad's line.

On the seventeenth of September, 1907, Etta C. Reid tendered to the railway company at its depot in Charlotte, where it usually accepts freight, a lot of household goods

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nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment. (Code of North Carolina, 1905, sec. 2631.)

and kitchen furniture and offered to pay the freight charges thereon. She demanded that the company issue to her a bill of lading "reading from Charlotte, in the State of North Carolina, to Davis, in the State of West Virginia, consignee to be Samuel Hammock." The railway company declined to name a rate to be charged for the transportation of the goods, declined to permit her to prepay the freight charges from Charlotte to Davis, declined to receive the goods for shipment, and declined to issue a bill of lading therefor.

She renewed her request on four successive days, and, with each demand, the company refused to comply. On September 23, 1907, the company named the sum of $34.08 as the amount necessary to prepay the freight charges on the shipment from Charlotte to Davis, and thereupon she paid the said sum and the company issued a bill of lading to her.

On September 17, 1907, no through and joint rate of freight had been established by the railway company and the Western Maryland Railroad Company and other roads which the shipment would have to pass over going from Charlotte to Davis, "and no such rates had been filed with the Interstate Commerce Commission and no rate of freight had been established or filed with the Interstate Commerce Commission, or published, covering shipments between said points." On that day, when Etta C. Reid made her demand of the railway company, the company's agent advised her that there was no established rate for the shipment, that no rate had been filed or published, that he did not know the rate, that he had no authority to receive the goods or the freight charges thereon to destination and no authority to issue a bill of lading reading "final destination, Davis, in the State of West Virginia."

The agent wired the officer having charge of such matters to obtain authority to name a through and joint rate,

to receive the shipment and issue a bill of lading. Immediately thereafter the officers of the company took up with the officers of the companies over whose lines the shipment of freight would have to move the establishment of a rate, with the result that a rate was established. On Monday, September 23, 1907, the local agent was informed of such rate and given authority to receive the shipment and to issue a bill of lading. Thereupon the company received the shipment, accepted the amount of freight in accordance with the joint and through rate, and issued the bill of lading.

There is, and was at the date of the tender of the goods, a telegraph office at Davis. Mrs. Reid remained at Charlotte for the time mentioned awaiting the establishment of the rate.

It is stipulated that she was damaged in the sum of $25, for the recovery of which and the penalties prescribed by the statute she asked the court to adjudge.

The railway company resisted the demand and contended that to hold that the act was applicable to it would violate the commerce clause of the Constitution of the United States.

Judgment was awarded to defendants in error as prayed, and it was affirmed by the Supreme Court of the State, two members of the court dissenting. 153 No. Car. 490.

This statement indicates the questions which are presented for solution and the principles upon which the solution of them depends. It hardly needs to be stated that transportation of property between the States is interstate commerce, and may be of Federal rather than of state jurisdiction. We say may be of Federal jurisdiction, for interstate commerce in its practical conduct has many incidents having varying degrees of connection with it and effect upon it over which the State may have some power. As to the extent of the power and the occasions for its exercise, controversies have arisen, and in deciding which

the power of the State over the general subject of commerce has been divided into three classes: First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the State cannot act at all. *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209; *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 655.

These divisions, however, express but the extreme boundaries of the subject. Something more definite is necessary for the decision of the opposing contentions in the case at bar. The Supreme Court of the State was of the view that the statute simply regulated a duty which preceded the entry of the goods in interstate commerce, and concluded, therefore, that the statute was "neither an interference with nor a burden upon interstate commerce." And it decided that the execution of this duty was not precluded by the provision of the Interstate Commerce Act requiring a schedule of tariffs to be established and charged. It was said by the court that it was the duty of the railway company to file such schedule, and that the company could not justify the violation of its common law duty by the neglect of its statutory duty.

The case, however, is not quite in such narrow compass. There is something more to be considered than the accumulation of defaults, if there be defaults. It is undoubtedly the duty of a railway company to receive freight when tendered for transportation. It may, besides, have other obligations, but it does not follow that it is within the power of the State to enforce them. There may be a Federal exertion of authority which takes from a State the power to regulate the duties of interstate carriers or to provide remedies for their violation. This is realized by defendants in error, and they assert that the state statute is in aid of commerce, and not an interference with or burden upon it, and therefore must be sustained as a valid exer-

cise of the State's power, citing *Atlantic Coast Line R. R. Co.* v. *Mazursky*, 216 U. S. 122; *Western Union Tel. Co.* v. *James*, 162 U. S. 650.

In those cases, and in the later case of *Western Union Tel. Co.* v. *Milling Co.*, 218 U. S. 406, the principle is expressed that "there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those engaged in interstate commerce." Such exercise of power, it was further said, was in aid of interstate commerce, and, although incidentally affecting it, did not burden it. But the facts of those cases distinguish them from the case at bar, and make their principle inapplicable. In the Telegraph Company cases there was a failure to transmit or deliver telegrams, in violation of the duty so to do imposed by the particular state statutes. In the railroad case a statute of the State of South Carolina which required carriers to settle within a specified time claims for loss of or damages to freight while in their possession within the State was sustained against the objection that it was an interference with interstate commerce. In none of the cases, however, was there any Federal legislation upon the subject involved, and in all of them such circumstance was stated as an element of decision. The circumstance is important, and we are brought to the inquiry whether it exists in the present case.

It is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised. The question occurs: To what extent and how directly must it be exercised to have such effect? It was decided in *Missouri Pacific Railway Co.* v. *Larabee Mills*, 211 U. S. 612, that the mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule

that Congress by nonaction leaves power in the States over merely incidental matters. "In other words," and we quote from the opinion (p. 623), "the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. . . . Until specific action by Congress or the commission the control of the State over those incidental matters remains undisturbed." The duty which was enforced in the state court was the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce. This duty was declared (p. 624) to be a common law duty which the State might, "at least in the absence of Congressional action, compel a carrier to discharge."

The principle of that case, therefore, requires us to find specific action either by Congress in the Interstate Commerce Act or by the Commission covering the matters which the statute of North Carolina attempts to regulate. There is no contention that the Commission has acted, so we must look to the act. Does it, as contended by plaintiff in error, take control of the subject-matter and impose affirmative duties upon the carriers which the State cannot even supplement? In other words, has Congress taken possession of the field?

It is not possible to epitomize the act by giving a more particular designation than that it was designed to regulate interstate commerce. Something more was certainly intended by it than the mere ordaining or the supervision of the movement of goods. In a certain general way traffic would be regulated by railroad and shipper, but their powers were not equal. The railroads had the

greater power, and might and did exercise it in unreasonable charges and in discriminations. The potent instrument for this was the difference in the rate charged for transportation or by secret rebates if the charge was not discriminating in the first instance. Hence we said, in *Texas & Pacific Ry.* v. *Abilene Oil Co.*, 204 U. S. 426, 437: "The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates." To that end, it was further said, schedules of rates were required to be established and published, and departure from the rates established, except in the manner authorized by the act, was forbidden under criminal penalties, and any injury to persons was provided to be redressed through application to the Commission or to the courts. And it is provided that "if no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation."

The Commission is given the power to determine and prescribe the manner in which the schedules required by the act are to be kept. And it is enacted that, unless otherwise provided, no carrier "shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act."

It is evident, therefore, that Congress has taken control of the subject of rate making and charging. All of the particular details we cannot set forth without extensive quotation from the act, which it is quite inconvenient to make. The provisions of the act are directed at the abuses most to be feared, unreasonableness in the rates and discriminations, including in the latter discriminations in service, in the acceptance and delivery of freight and in facilities fur-

nished. The power which has been given to the Commission to secure those results we have set forth in *Texas &c. Ry. Co.* v. *Abilene Oil Co. supra,* and in *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.,* 215 U. S. 481. In the first case it was said (p. 439): "It is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law." After citing cases, it was further said (p. 439): "When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination." In that case it was decided that a shipper could not maintain an action at common law in a state court on the ground that a rate established in accordance with the Interstate Commerce Act was unreasonable. In the second case was considered the power of the Commission under the amendments of 1906, and it was decided that on the principles announced in the *Abilene case,* and from a consideration of the amendments and their purpose to supply the defects of the act and enlarge the powers of the Commission, the distribution of coal cars by the railroad company among shippers was a matter involving preference and discrimination, and within the competency of the Interstate Commerce Commission to consider, and that the courts could not interfere with such distribution until after action by the Commission. This was resolved notwithstanding § 23 of the act gave jurisdiction to the Circuit and District Courts of the United States to command, at the suit of one aggrieved, a common carrier "to move and trans-

port the traffic or to furnish cars or other facilities for transportation." And transportation means not only the physical instrumentalities, but all services in connection with receipt, delivery and handling of property transported, and such transportation the carrier must "provide and furnish upon reasonable request therefor." (Section 1, paragraph 2, of the act, as amended June 29, 1906, by the Hepburn Act, 34 Stat. 584, c. 3591.) Section 20 of the latter act requires the carrier to issue a bill of lading for an interstate shipment, and makes the carrier liable for the loss of or damage to property while on its own line, and also while on the lines over which the property may pass.

There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of. We are, therefore brought to consider what the statute of North Carolina provides. Leaving out qualifications with which we are not concerned, the act requires railroad companies to receive freight for transportation whenever tendered at a regular station and forward the same over the route selected by the person offering the shipment. Fifty dollars a day is the penalty prescribed for refusal, and all the damages incurred.

The particular act which was held to violate the statute was refusing the tender of goods for shipment from Charlotte, North Carolina, to Davis, West Virginia, that is, a tender for interstate shipment, and a demand coincidentally for a bill of lading covering the shipment explicitly stating the origin of the shipment at Charlotte and its destination at Davis. The Supreme Court of the State decided, as we have seen, that the statute deals with a common law duty simply, one which attaches before freight enters into interstate commerce, and hence concluded as

follows: "The statutory enforcement under penalty of the common law duty to accept freight 'whenever tendered' is not within the scope or terms of any act of Congress. It is neither an interference with nor a burden upon interstate commerce." We are unable to agree with the conclusion. It would destroy absolutely Federal control until the freight was in the possession of the carrier, and is directly contradictory of the provision of the Interstate Commerce Act which we have quoted. See, in this connection, *Houston & Texas Cent. R. R. Co.* v. *Mayes*, 201 U. S. 321. In the term "transportation," we have seen, Congress has included "all services in connection with the receipt . . . of property transported." And this certainly imposes the obligation to receive the property as well as to carry it, one of the obligations the carrier must perform "upon reasonable request therefor." Other provisions of the same import and direction might be quoted. Conditions put on the receipt of articles at the railroad station may be conditions upon the traffic, and necessarily are within the regulating power of Congress. Their inducement and aim may be to secure a prompter performance of duty by the carrier, and so far beneficent. But that is not the question. The question is, Where is the control, in the State or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is demonstrated by the provisions of the Interstate Commerce Act to which we have referred. As we have seen, schedules of rates, whether the road be single or forms with another a "through route," must be established, filed and published, designating the places. They cannot be changed without permission of the Interstate Commerce Commission, and no carrier is permitted to engage or participate in the transportation of passengers or property unless the rates for the same have been so filed and published. Criminal punishments are imposed for violations of these requirements, and civil redress of in-

juries received by shippers is given through the Interstate Commerce Commission. See *Robinson* v. *B. & O. R. R. Co.* (appears in next number). By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties.

We cannot assume that it was without consideration of its necessity that Congress enacted § 2 of the Hepburn Act. It was no doubt the adaptation of experience to the exigencies of a practical problem, Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to "engage or participate in the transportation of passengers or property" until they had fixed and proclaimed the rate to be charged therefor—a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times. The power of Congress to so provide cannot be doubted. If the regulation be not exclusive, this situation is presented: If the carrier obey the state law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the state law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground. In so deciding we take no essential power from the States. The balances of the Constitution are only preserved and there is given to the States the power which is the States' and to Congress the power which belongs to Congress.

But if there be a middle ground, it certainly can be argued that the cases establish that it is passed when the

state regulation burdens interstate commerce, and whether a regulation has such effect may be determined by its sanctions. If a penalty of $50 for refusing to receive freight "when tendered" be no burden on interstate commerce beyond the power of a State to impose, would a penalty of $100 or $1,000 likewise be no burden? May not the power which is competent to impose a penalty select its amount? The penalty of the North Carolina statute, it is to be remembered, is independent of the damage received, and what excuses or defenses may be offered the decisions of the court leave in doubt. The statute seems to permit none. The case at bar illustrates somewhat its peremptory character, and the case which was argued with this (*Southern Railway Company* v. *Reid and Beam, post,* p. 444,) still more so. The plaintiffs in that action sued for $750 for refusal to receive and forward a carload of shingles and recovered $350, although one of them testified that they "never lost a cent." The circumstance was declared by the court, citing a prior case, to be immaterial, as the penalties were "not given wholly on the idea of making pecuniary compensation to the party injured, but usually for the more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment." The policy of the statute, then, is to require the acceptance of freight "when tendered," with daily accumulating penalties upon refusal to do so. If such power be conceded, what is the limit of its exercise, either as to conditions or penalties?

One other contention remains to be noticed. It is said that there is not presented in the case the dilemma of alternative penalties, for the Hepburn Act, it is pointed out, requires a schedule of rates to be filed only "when the through route and joint rate have been established," and that none were established in the case at bar and that, therefore, the railway company was not put to a choice of obligations and subjected to punishment however it might

choose. But it is also provided that "if no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation." There is nothing in the record to show that there were such established separate rates and that separately established rates were published and kept open for inspection. Indeed, the record shows that a through rate had to be fixed by the several carriers in the through route.

It was only because of the obligation imposed by the Hepburn Act that the railway company refused to receive the goods tendered to it and the agent of the company informed defendant in error that he was without power to comply with her demand. He promptly acted in the matter when the lines over which the freight had to pass established a joint rate. He then received the goods, issued a bill of lading therefor, "and the shipment went forward to its destination."

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

SOUTHERN RAILWAY COMPANY *v.* REID & BEAM.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 80. Argued December 6, 1911.—Decided January 9, 1912.

Southern Railway Co. v. *Reid*, *ante*, p. 424, followed to effect that legislation of Congress in regard to matters of interstate commerce need not be inhibitive, but only to occupy the field, in order to supersede state statutes on the same subject. *Northern Pacific Ry. Co.* v. *Washington*, *ante*, p. 370.

This case is controlled by and decided on authority of *Southern Railway Co.* v. *Reid*, *ante*, p. 424, notwithstanding certain differences in fact.

153 N. Car. 753, reversed.

THE facts, which involve the validity of a statute of North Carolina affecting common carriers, are stated in the opinion.

Mr. Alfred P. Thom, with whom *Mr. John K. Graves* was on the brief, for plaintiff in error in this case and in No. 487 argued simultaneously herewith (see p. 425, *ante*).

Mr. Plummer Stewart and *Mr. Jno. A. McRae* for defendants in error in this case and in No. 487 argued simultaneously therewith (see p. 429, *ante*).

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves a consideration of the statute of North Carolina passed on in No. 487, and was argued and submitted therewith. The question, then, only is whether the principles there expressed apply to it.

The action was brought by defendants in error, a copartnership, against the plaintiff in error, a railway company and a common carrier, for penalties under the statute, which is set out in the opinion in No. 487, to recover the sum of $50 a day for fifteen days for failing and refusing for such time to receive a carload of shingles tendered to the company at Rutherfordton, North Carolina, for shipment to one James Haddox, at Scottsville, Tennessee.

The case was tried before a jury, which rendered a verdict for the plaintiff firm (defendants in error) for the sum of $350, upon which judgment was duly entered. It was

affirmed by the Supreme Court two of the members of the court dissenting as in No. 487. 150 N. Car. 753.

The statute is attacked on the same ground as in case No. 487. The facts, as recited by the Supreme Court, are as follows: Defendants in error having received an order for a carload of shingles from Haddox at Scottsville, Tennessee, applied at Rutherfordton to the railway company for a car. It was furnished and loaded, shipping instructions given, prepayment of the freight tendered and a bill of lading demanded. The agent of the company refused to give the bill of lading or ship the goods, assigning as a reason that he did not know where Scottsville was nor the road to it. Defendants in error demanded that the goods be shipped, and told the agent that they would pay any additional amount found to be due, and requested that when the agent got ready to ship to telephone them and they would come over and pay the freight due. Another agent "came to take over the agency, and being told, on inquiry of plaintiffs (defendants in error), about the carload of shingles and what the trouble was," he asked for instructions, which were given him, and on July 19th the freight was paid, the bill of lading given, and the shingles shipped as directed, "arriving at their destination without further let or hindrance." Defendants in error testified that they had received no pecuniary injury by reason of the delay, and that the first agent "still had charge of the depot when the shingles were shipped."

There was evidence offered on the part of the railway company that Scottville was an industrial siding on the Knoxville & Augusta Road eight or ten miles out of Knoxville, established for the convenience of persons shipping brick from that point, and that bills of lading for goods shipped to and from that point were made out at Rockford, a regular station, two miles distant. It was testified that since the consolidation of the East Tennessee & Virginia Railroad with the old Richmond & Danville, the

railway company (plaintiff in error) had paid all of the employés of the Knoxville & Augusta Road their salaries.

The statute was attacked by the railway company in its requests for certain instructions, the refusal to give which was sustained by the Supreme Court. The court intimated that, as had been held in a former opinion, the commerce clause of the Constitution was not involved in the case on the ground "that the penalty [under the statute] accrues before the 'freight is accepted for transportation,' and on the principle applied in the case of *Coe* v. *Errol*, 116 U. S. 517." But the court, conceding, *arguendo*, "that the goods when tendered for transportation to another State, as to matters involved in such transportation, and in reference to these penalty statutes, should be considered and dealt with as interstate commerce," was of opinion that the contention of the railway company could not be sustained, and concluded, after a careful discussion of cases in this court and in the state court, that the statute did not burden interstate commerce, and that, "in the absence of inhibitive congressional legislation, or of interfering action on the part of the Interstate Commerce Commission, the statute in question is a valid regulation in direct and reasonable enforcement of the duties incumbent on defendant as a common carrier."

We have shown in the opinion in No. 487, *ante*, p. 424, that there need not be directly "inhibitive congressional legislation," but congressional legislation which occupies the field of regulation and thereby excludes action by the State. *Northern Pacific Ry. Co.* v. *State of Washington*, *ante*, p. 370.

The facts in this case are somewhat different from those in No. 487 and require to be noticed. The majority of the court found that it did not appear from the testimony that the railway company had not filed its schedule of rates with the Interstate Commerce Commission to Scottville, Tennessee, the court observing that it could "hardly be

seriously contended that the difference between Scottville, Tenn., and Scottsville, Tennessee is of the substance." The court further said: "The presumption is that the company has complied with the law. And if it were otherwise, we are of opinion that the act of Congress, and the orders of the Commission made thereunder, requiring the publication of rates, was made for an entirely different purpose from that involved in this inquiry, and does not constitute such interfering action. See *Harrell* v. *Ry.*, 144 N. C., pp. 540–541."

We have set forth in No. 487 our reasons for holding otherwise.

Judgment reversed and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice LURTON does not agree with the court as to the facts of this case, and for that reason does not think that it falls under No. 487. He, therefore, dissents.